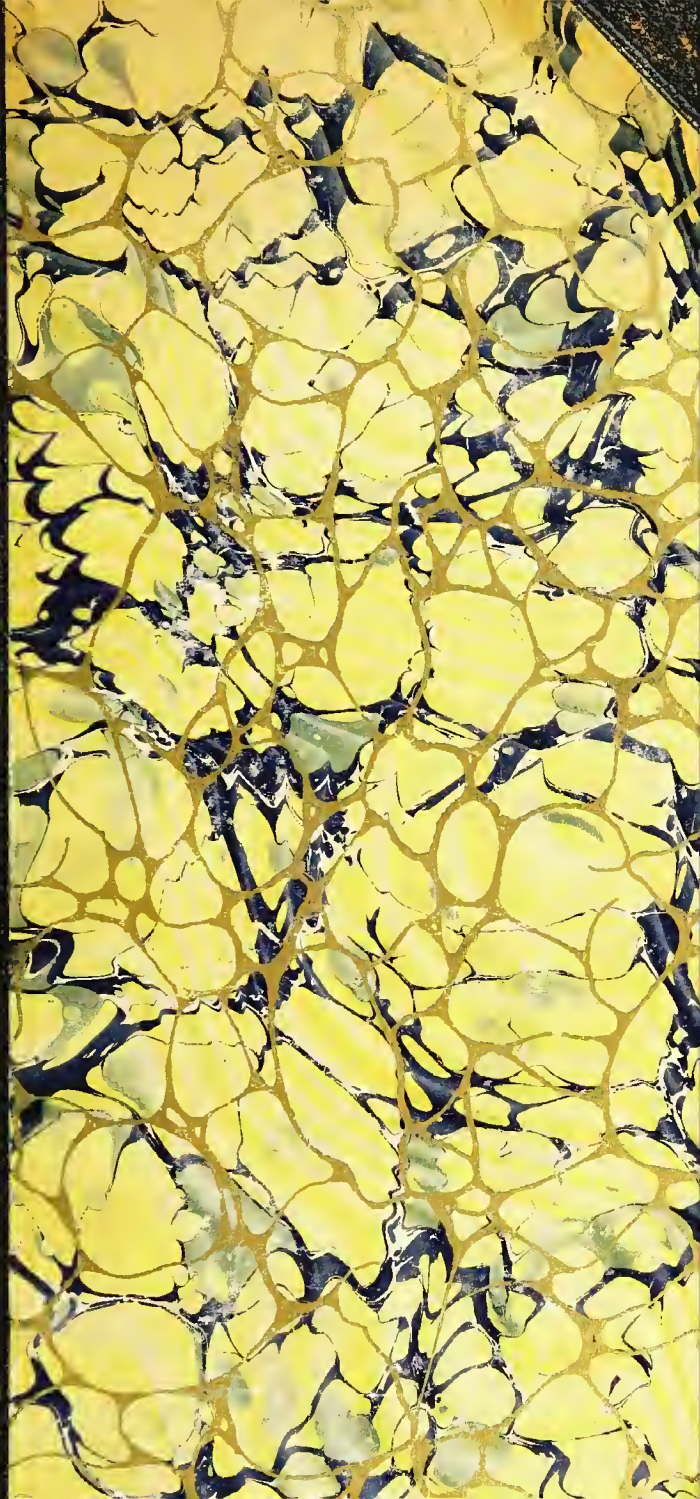

Date Due

OCT 20 1960			
MAY 2 3 1969			
PRINTED IN U. S. A.		CAT. NO. 23233	

REGULATION

OF

RAILWAY RATES

ON

INTERSTATE FREIGHT TRAFFIC

HENRY FINK.

NEW YORK:
THE EVENING POST JOB PRINTING OFFICE,
Broadway and Fulton Street.

1905.

TABLE OF CONTENTS.

REGULATION OF RAILWAY RATES ON INTERSTATE FREIGHT TRAFFIC.

I.

REGULATION BY THE RAILROADS, OR SELF-GOVERNMENT.

II.

REGULATION BY THE FEDERAL GOVERNMENT.

TABLE OF CONTENTS.

III.

ADDITIONAL LEGISLATION.

TABLE OF CONTENTS.

INTRODUCTION.

At a time when the question of the regulation of railway freight rates by the Federal Government is engaging public attention, and demands are being made that the powers of the Interstate Commerce Commission be enlarged, it may serve a useful end to invite attention to some of the facts and principles involved in the adjustment of rates on interstate freight traffic; to inquire into the methods of freight-rate regulation which have been adopted in the past, into the effects of existing legislation, and what additional legislation is needful and practicable in order to abate the evils attending the operation of railroads in this country.

I have pointed out the facts bearing upon rate regulation as it was given to me to see them from my own observation, and from documents in my possession or to which I have had access. The thoughtful reader will make his own deductions. I have thought that my own opinions and conclusions might be of some interest from the fact that they are based on experience acquired during my continuous connection with American railroads from 1851 to the present time.

New York, August 1, 1905.

REGULATION OF RAILWAY RATES

ON

INTERSTATE FREIGHT TRAFFIC.

FOR THE PURPOSE OF THIS INQUIRY, THE SUBJECT UNDER CONSIDERATION WILL BE DIVIDED INTO

I. REGULATION BY THE RAILROADS THEMSELVES.
II. REGULATION BY THE FEDERAL GOVERNMENT.
III. ADDITIONAL LEGISLATION.

I.

REGULATION BY THE RAILROADS, OR SELF-GOVERNMENT.

It is necessary to a correct understanding of the subject of freight-rate regulation, to first consider the

ADJUSTMENT OF FREIGHT RATES.

How are Freight Tariffs Made?

It cannot be said that the establishment of railroad tariffs is a science in the sense that science is organized knowledge. So many considerations, and such an endless variety of circumstances and conditions, affect the question, that it is impossible to organize the knowledge that is obtained from observation and experience so as to formulate general rules, or establish workable theories for guidance in the complex work of rate adjustment.

For example: It may be said that a railroad favorably located in respect to the sources of its traffic, and

economically constructed and operated, should yield to its owners a fair return on the capital actually invested, and that rates should be so fixed that each article of freight carried over the road should pay the cost of its transportation, and, in addition thereto, an equitable proportion of the fixed charges, and of the dividends to be paid to the stockholders.

But the cost of transporting any particular article of freight is not known, and cannot be ascertained; nor can the amount and character of the traffic which is to be assessed with these charges be known in advance. Moreover, the principles that should govern the equitable distribution of such charges remain to be discovered.

But assuming that freight rates could be made according to this theory, it might and probably would be found that they were in many cases higher than the rates in effect on a competing railroad or water line; so that the rates made upon mathematical principles and according to rules of equity would be of no practical use.

How, then, are railway freight tariffs made? They are not made, but are the products of evolution.

In my monograph on "The Adjustment of Railway Freight Tariffs," published in 1894, I called attention to the fact that the prejudices against railroad corporations are due, in a measure, to an impression that the managers of railways have the absolute power to establish freight tariffs for their respective roads, that they exercise such power arbitrarily, solely for selfish purposes, and without regard to the public interest. This impression is erroneous. The facts are that railroad companies have a very limited control over their freight tariffs; that the cases are exceptional where they have the power to *make* or establish rates; that generally they can only adjust their rates of transportation in accordance with certain conditions and circumstances over which they

have no control. This is not only true of competitive traffic and interstate traffic, but also as to rates on traffic within a State, and on local traffic for which there may be no direct competition.

I also pointed out some of the difficulties attending the adjustment of railway freight tariffs, as follows:

"The adjustment of railway freight tariffs in compliance with the requirements of the law, and of the rules of equity, and in accordance with the circumstances and conditions that are of controlling force, is surrounded by many and formidable difficulties. In treating of the subject of the 'reasonableness of charges', the Interstate Commerce Commission, in its First Annual Report, page 36, uses the following language:

" 'Of the duties devolved upon the Commission by the Act to Regulate Commerce, none is more perplexing and difficult than that of passing upon complaints made of rates as being unreasonable. The question of the reasonableness of rates involves so many considerations and is affected by so many circumstances and conditions which may, at first blush, seem foreign, that it is quite impossible to deal with it on purely mathematical principles, or on any principles whatever, without a consciousness that no conclusion which may be reached can by demonstration be shown to be absolutely correct. Some of the difficulties in the way have been indicated in what has been said on classification; and it has been shown that to take each class of freight by itself and measure the reasonableness of charges by reference to the cost of transporting that particular class, though it might seem abstractly just, would neither be practicable for the carriers nor consistent with public interest.'

"The difficulties here referred to of passing upon the question of the reasonableness of rates, are doubtless very great. But how much greater must be the difficulties that are encountered by the railroad officials in *adjusting* their freight tariffs. The rates of freight must be sufficiently low to result in the development of the largest amount of traffic; and, at the same time, they must be high enough to

produce sufficient revenue to pay for the cost of maintenance and operation of the roads, and, if possible, interest on the investment. The rates must in no case exceed the value to the public of the services rendered, which is determined by commercial laws, by competition with all-rail lines, with rail and water lines, and with water lines; by competition between markets, by competition of products with products, by the value of the articles of freight at the places of production or manufacture and the places of consumption, and by other circumstances and conditions. The rates must be adjusted in compliance with the laws of the States, and with the Act to Regulate Commerce. They must be just and reasonable in and of themselves, as required by the first section of the Act to Regulate Commerce; they must comply with the second section of the Act, which prohibits unjust discrimination against persons; they must comply with the third section of the Act, which provides that there shall be no undue or unreasonable preference or advantage given to any particular person, company, firm, corporation or locality, or to any particular description of traffic, in any respect whatsoever; and they must also comply with the fourth section of the Act, which declares that it shall be unlawful to charge or receive any greater compensation in the aggregate for the transportation of property for a shorter than for a longer distance over the same line, in the same direction, except under circumstances and conditions which the Act does not define, and of which the carriers are required to judge in the first instance, at least so far as regards their similarity, or dissimilarity.

"It is obvious that the officers of railways, in endeavoring to meet all these requirements, and many others that might be mentioned, have a very difficult task in the adjustment of their freight tariffs, and that they will nearly always find themselves in a dilemma.

"It is not sufficient that their rates may be just and reasonable *in and of themselves.* They must also be *relatively reasonable.* They may be both reasonable *in and of themselves,* and *relatively reasonable,* and yet may be claimed to be in conflict with the short and long haul section of the Act. If, in order to remove that difficulty, the

rates to and from terminal points are advanced so as to conform to the alleged requirements of the long and short haul section of the Act, the rates may be higher than the value to the public of the service, in which case the company must lose the traffic. If, on the other hand, the rates to and from intermediate points are reduced, the loss of revenue may be so great that the railroad companies may find themselves unable to pay the cost of maintaining and operating their roads."

Since the above was written, the difficulties surrounding the proper adjustment of railway freight tariffs have been greatly increased by the decisions of the Supreme Court of the United States in the Trans-Missouri and Joint Traffic Association cases, which prohibit the establishment of rates by agreement between competing railroads.

The power to establish tariffs is vested in the Boards of Directors of railroad companies, under charters granted by the States which created these corporations. And the power is exercised through the executive officers, —the Presidents or Vice-Presidents—and a department known as the traffic department, or commercial department.

The officials of this department should be, and generally are, men gifted with no ordinary ability. They must have a thorough knowledge of their profession: and this knowledge can only be acquired by practical experience. They must bring to the performance of their duties, good judgment, great energy, and untiring industry. They must familiarize themselves with the commercial and industrial conditions in the country tributary to their respective roads; and, by frequent intercourse with shippers, acquaint themselves with their needs and requirements. It has been said that they should know the business of the shippers almost as well as the shippers do themselves.

As above stated, the establishment of tariffs is not a science. Modern freight tariffs are the products of evolution. It would be interesting to trace their development from the simple rate-sheets of the earliest days of railroads to the modern, highly organized freight tariffs, with their elaborate classifications, embracing thousands of articles; and to note the influence and effect of surrounding circumstances that necessitated, from time to time, modifications and additions; and, especially, the effect of ever-increasing competition. Unfortunately, the information necessary is not obtainable.

In my monograph on "The Adjustment of Railway Freight Tariffs," I endeavored to show why the cost of transportation is not, and from the nature of the case cannot be made, a factor in the adjustment of rates. To treat this subject here at length would be too great a digression. Attention can only be called here to some of the results of that investigation.

All computation of the cost of transporting freight over a road must be based upon a division or apportionment of the expenses pertaining to the conduct of both the passenger and freight service; and this apportionment cannot be made with any reasonable approach to accuracy, because there is no basis for a division of a large proportion of those expenses.

An analysis of the expenses of railways of the United States which made reports to the Interstate Commerce Commission for the year ended June 30, 1891, shows that 31.4 per cent. of the operating expenses, and 52.6 per cent. of the total expenses, including taxes and fixed charges, cannot be properly apportioned between the passenger and freight service.

All attempts to apportion these expenses are mere guess-work, which, of course, is also true of the alleged average cost per ton, per mile, of all freight carried over

a road. The mere cost of movement—that is, the expense of receiving, transporting and delivering freight—can be estimated with a reasonable approach to accuracy, when all the conditions and circumstances are known under which the service has to be performed. These conditions vary on each railroad, and often vary on different sections of the same road.

But the cost of movement is only a portion, and the smallest portion, of the cost of transportation.

Assuming, however, that the cost of transportation could be ascertained, it cannot be made the basis of freight tariffs. It is safe to say that since the construction and operation of the first railroad up to the present time, no freight tariff has ever been constructed on the basis of the cost of transporting any article, nor on the average cost per ton, per mile, of the entire freight traffic; and it is also safe to predict that such actual cost and average cost will not be factors in the construction of future freight tariffs. This is true not only because these factors are unknown, and cannot be ascertained, but also because they cannot be considered in the establishment of freight tariffs.

Before the Sherman Act was applied to railroads, the rates on interstate traffic were generally adjusted by agreement between the traffic officials of the roads interested, under the rules of traffic associations. In most cases, unanimity was required to fix a rate; and in cases of a failure to reach agreements, the questions at issue were decided by arbitration.

Most of the questions involved in the adjustment of freight tariffs are of a commercial and economic character, and subject to commercial and economic laws. One of the most important and in many cases the controlling factor, is competition,—either competition between carriers by rail, competition with rail and water

lines, competition with water lines, competition between markets, or competition of product with product.

COMPETITION AND ITS EFFECTS.

Competition is defined as the act of striving for something that is sought by another at the same time,—a contention of two or more for some object, or for superiority.

There are two kinds of competition, and which should be distinguished one from the other; viz.:

Legitimate or healthy competition, which is said to be the life of trade, and

Illegitimate or unhealthy competition, which results in the ruin of trade, and the ruin of competing traders.

Competition between railroads is legitimate when their managers strive to put their properties in the best condition for efficient, safe and economical operation, and to render their services at rates that are reasonable and just to the public, as well as to the owners of the roads.

It is to be presumed that it was this kind of competition which was in the minds of legislators when they made the rule of free competition the basis of railway legislation.

Legitimate competition between railroads degenerates into illegitimate or unhealthy competition when conducted without restraint. It then becomes a struggle to enforce claims to a larger share of competitive traffic, or claims for a more favorable correlation of rates, or for some other advantages,—a struggle that is generally conducted by illegitimate methods, and always without regard to cost or consequences; a struggle that can benefit no one, and, when long continued, must end in the ruin of the competitors.

This strife is known as a war of rates,—the principal weapon employed being radical reductions of rates; that is, rate-cutting either made openly, or by rebates, and until the prices for the services rendered fall far below their actual cost. Rate wars are invariably inconclusive in respect to the controversies that produce them. Some of the competitors may be forced into bankruptcy; but this does not mean victory for the survivors, who cannot obtain war indemnities, nor annex a part of the properties of the vanquished. At the close of the war, the matter at issue remains unsettled, and the bankrupt roads can resume the contest with renewed vigor under receiverships, being freed from the obligation of paying interest. Such contests have justly been regarded as a disgrace to railroad management, and to civilization. The law of evolution which decrees that the fittest shall survive, does not apply to these struggles for existence.

American railroad managers have been severely criticised for engaging in such strifes; their conduct has been characterized as criminal; for it is said that officers of railroad companies are only agents and trustees, and have no right to involve the property placed in their charge in a strife which, if continued, would bring that property to ruin.

This is true; but it is only true in respect to a very small minority to whom it can be justly applied. The majority of railroad men do not willingly engage in such contests; they drift or are forced into them by circumstances over which they have no control. The fault lies with the system rather than with the men. It is unlimited individualism, also known as "free competition," which results in a war of each against all.

Each railroad corporation has the right to take individual action in the adjustment of rates on interstate competitive business. Indeed, modern laws require each

corporation to act independently, harmonious co-operation being prohibited. So long as this is the case, there will be rate-cutting, and periodic rate-wars, unless some legal means can be found to restrain competition.

The injury inflicted by such independent action is not confined to the railroads. Long-continued strife affects a large class of the population; viz., the railroad employees, and still further, the manufacturing interests connected with railroad operation. The extremely low rates caused by these wars deplete the revenues of the railroads to an extent that necessitates a reduction of wages; and this may lead to riots and bloodshed, as it has actually done.

Manufacturing interests connected with the railroads are made to suffer by a reduction of expenses enforced upon railroads by diminished earnings.

But the most serious evils that result from unrestrained competition are felt by the mercantile communities, whose best interest requires that rates of transportation shall be just, reasonable and indiscriminatory, and, as far as practicable, permanent—discriminatory and fluctuating rates being very injurious to commerce. The law requires public carriers to furnish the people with such rates; but under the rule of free competition, it is impossible for the railroads to fully comply with the law.

It has been said that competition is stronger than any law that Congress can make; and, so far, legislation of the most drastic kind has failed to wholly eradicate the evil of unjust discrimination, which has for many years been the cause of complaint by the public against the railroads. And it is safe to predict that, so long as each of the carriers can make its rates and charges different from those of all the others for the same service, there can be no stability of rates, and unjust discriminations of all kinds cannot be entirely prevented.

It should be borne in mind that competition between railroads differs materially from commercial competition. The effects of the latter are generally local and and confined to certain branches of commerce, while the former affects all branches, and even the entire commerce and industries of a large section of the country. Owing to the interdependence of rates, a war between two railroads of one section may involve many other railroads—even those in sections remote from the conflict.

REGULATION OF RATES THROUGH TRAFFIC ASSOCIATIONS.

The earliest attempt on record to regulate rates by co-operation of the railroad companies was made at a Convention of representatives of southern railroads and steamship companies, held at Macon, Georgia, December 21, 1874, and presided over by Hon. Jos. E. Brown, ex-Governor of Georgia.

This Convention, after a full discussion of the situation, appointed several committees on division of business, agreed upon rates on certain competitive traffic, and passed a resolution pledging each company to every other company represented, to carry out in spirit and in letter, the proposition agreed to.

Adjourned meetings of the Convention were held in January, 1875, for the purpose of strengthening the agreements. At one of these meetings the following resolution was adopted. It is of interest as showing the demoralization of rates, and the disreputable practices resorted to by the agents of competing lines which had brought about this demoralization:

"WHEREAS, The ruinous competition now existing between railway lines here represented demands a speedy

change and prompt return to remunerative rates of transportation; and

"WHEREAS, The disreputable custom that has, in the past few years, grown up of paying bribes to freighters to obtain their business over competing lines, has so demoralized railway management and the communities through which they operate, that a prompt and radical change is called for by every consideration of honor and honesty; therefore

"*Resolved,* That standard rates of transportation shall be established and maintained, by which stockholders may enjoy with their patrons the benefits created by their respective lines.

"*Resolved,* That all kinds of 'bribery' and 'corruption' in the form of 'drawbacks' and 'rebates' paid to obtain patronage shall, in the future, be regarded as disreputable, dishonest and unbecoming railroad management, demoralizing to railroad employees and their patrons; and we hereby pledge ourselves and our companies to discontinue business relations with railroad companies or individuals that shall continue these disreputable practices.

"*Resolved,* That it is the sense of this Convention that the best interests of the stockholders of our respective companies require that in all future Conventions, called for the purpose of regulating freight and passage rates, and the like, the Presidents or General Superintendents, and such other persons as the management shall appoint, should attend such conventions and represent their companies."

The railroad managers continued to struggle with the problem, and during the year 1875 held a number of meetings for the purpose of effecting an efficient organization.

A meeting held in Atlanta, October 13, 1875, adopted certain rules and regulations proposed by Albert Fink, and which led to the organization of the Southern Railway and Steamship Association. Until this organization was in operation the first attempts in the South

necessarily resulted in failure, as was the case with efforts made in later years upon the same lines by northern railroad companies, notably the "Agreement between Gentlemen." These failures were due to the fact that compliance with the obligations of these agreements depended entirely upon the good faith and enlightened self-interest of the contracting parties. Not that there was a want of good faith—the railroad men were willing and anxious to carry out their agreements. But even in those early days, competitive forces had become so strong as to seriously impair the control of the Presidents over rates of freight on their own roads.

The condition of railroads in the South in 1875 was of a unique character. At the close of the War in 1865, most of these railroads were in a broken-down condition physically and financially. They were dependent for their revenues mainly upon the transportation of agricultural products of an impoverished country, whose system of labor was deranged. Although the volume of traffic was not sufficient to support the older lines, new lines had been and were being constructed. The natural result was a fierce struggle for traffic, and reckless competition and incessant rate-cutting, openly and by rebates.

As we have seen, agreements to regulate competition had proved ineffectual. Several of the railroads had already been sold at public auction. Others, aggregating over one thousand miles, were in the hands of receivers; and others not in the hands of receivers had defaulted in the payment of interest on their bonded debts. Millions of dollars invested in railroad properties had been sunk, and a large portion of the capital of railroads yielded no return, and was threatened with destruction.

Mindful of their obligations to protect the properties entrusted to their care, and not discouraged by previous

failures, the Presidents continued their efforts, and succeeded in October, 1875, in organizing.

THE SOUTHERN RAILWAY AND STEAMSHIP ASSOCIATION.

The creation of this Association is an important event in the history of the self-government of railroads, and deserves more than passing notice.

The agreement to form this Association, made by and between twenty-two railroad companies and three steamship companies, took effect in October, 1875. The objects of the Association are stated as follows:

1. To facilitate the transaction of business between said parties, and between said parties and other transportation companies, relating to such of the freight and passenger traffic in which any one of said parties is directly or indirectly interested with any other or others of said parties, or with any other transportation company.
2. To provide proper means to adjust promptly and amicably all differences that may arise between the parties on account of the traffic named in article first.
3. To provide proper means to enforce effectively and promptly all agreements that may be entered into between the parties on account of the traffic named in article first.

Hon. Joseph E. Brown was elected President of the Association, and served as such for many years.

Albert Fink agreed to act as General Commissioner for a period of six months.

Shortly after the formation of the Association, it published an address to the public, describing the deplorable condition of southern transportation matters, and which had necessitated this organization, and appealing to the public sentiment for approval and co-operation

in carrying out the measures that had been adopted. The fact that such an appeal was published is of great interest, as showing the friendly relations then existing between the railroads and the people. It would seem that the community of their interests was recognized, and that both parties cordially co-operated in efforts to build up the fallen fortunes of the South. That these efforts were successful, so far as success depended upon them, is evidenced by the present prosperity of the South; and that the railroads have contributed no small share in the work of developing the great resoures of that section, cannot be questioned.

Experience having shown that agreements to maintain rates which depend solely upon good faith cannot be carried out, the Southern Railway and Steamship Association adopted the plan of a division of competitive traffic in order to remove, as far as practicable, the incentive to rate-cutting. It used two methods of dividing such traffic.

According to one method, the business at competitive points was divided between the carriers interested, the division being made either by mutual agreement or arbitration; and each road was required to carry the proportions allotted to it. In some cases the rates were from time to time adjusted so as to bring about this division. This was called a physical division.

The other and far more effectual method was to require the companies which had carried an excess over their allotted proportion, to pay to those in deficit, in money, such balances as were due them. They were, however, allowed to retain an assumed cost of transportation of such excess. This method was known as a money division. The public, however, called it a pool; and when we come to consider the regulation of interstate commerce by the Federal Government, we shall find that

this bad name contributed in no small degree to the weakening of all traffic associations, and to their final destruction.

The Southern Railway and Steamship Association was in continuous operation until October, 1895, when it was succeeded by the Southern States Freight Association, which, in turn, was succeeded by the Southeastern Freight Association in April, 1897. This Association is still in existence.

The agreements of the Southern Railway and Steamship Association, by a process of evolution, passed through several modifications suggested by experience, and which greatly improved and strengthened it; so that, prior to 1887, when the Act to Regulate Commerce necessitated the abandonment of the money division of traffic, it had become the most efficient association for the self-government of railroads in this country.

It may be of interest to students of the railway problem to quote here, the preamble of an agreement of the Association, made July 15, 1886, and to give the substance of some of its provisions:

"WITNESSETH, That whereas, the establishment and maintenance of tariffs of uniform rates, and the prevention of unjust discrimination, such as necessarily arises from the irregular and fluctuating rates which inevitably attend the separate and independent actions of transportation lines, is important for the protection of the public; and

"WHEREAS, it is deemed to be to the mutual advantage of the public, and the transportation companies, that business in which they have a common interest should be so conducted as to secure a proper correlation of rates, such as will protect the interests of competing markets without unjust discriminations in favor of or against any city or section; and

"WHEREAS, these objects can be attained only by co-operation on the part of the various transportation lines

engaged in the traffic of the territory south of the Potomac and Ohio Rivers, and east of the Mississippi river.

"NOW, THEREFORE, In order to secure such co-operation among said transportation lines, by providing means for the prompt adjustment of the differences which may arise between them; by placing all of their traffic, common to two or more companies, under the control of officers jointly elected; by the general conduct of the same under well-defined rules and regulations, and by just and equitable division of business, such as will naturally insure the maintenance of rates, or by actual apportionment; it is mutually agreed as follows:

"FIRST.—That the organization herein provided for may include all such railways east of the Mississippi and south of the Potomac and Ohio rivers, and the steamship lines connecting them with Boston, Providence, New York, Philadelphia and Baltimore, which transact business with each other; *Provided,* such parties are included in this agreement, or may hereafter be admitted as parties thereto by the action of a general convention; and that the association herein formed shall be styled 'THE SOUTHERN RAILWAY AND STEAMSHIP ASSOCIATION.'"

The fourth article of this agreement creates an Executive Committee composed of representatives designated by certain members of the Association—the General Commissioner to be their Chairman.

The fifth article provides that this Committee shall meet at the call of the Chairman, or at the request of three of its members, absent members being represented by the General Commissioner. This Committee has jurisdiction over all matters relating to joint traffic, but *shall act only by unanimous consent of its members.* In the event of a failure to agree, questions at issue shall be settled by the Board of Arbitration.

The seventh article gives the Executive Committee the right to appoint a Rate Committee, or other sub-committees, either of their own number, or from among the

officers and agents of companies members of the Association, and to delegate to such Committee, jurisdiction over such matters as may be specially committed to their charge. The Rate Committee so provided shall have sole authority to make all rates and classifications to and from all points east and west into Association territory; but the sub-committees shall act only by unanimous consent, and failing to agree, the questions at issue must be referred to the Executive Committee for settlement. The General Commissioner is *ex-officio* Chairman of all sub-committees, and as such, shall be the medium of communication between the sub-committees and the Executive Committee. During the interim between the reference of any matter of difference from a sub-committee to the Executive Committee, and the final determination of such matter, the General Commissioner shall, if it be a matter requiring prompt action, have authority to decide it temporarily, and his decision shall be binding on all parties until reversed by the Executive Committee, or by arbitration.

The eighth article provides for the election at the annual meetings, and to hold office until the next annual meeting, and thereafter until their successors are elected, of a President, Secretary, General Commissioner, Auditor, and three Arbitrators.

The ninth and tenth articles define the duties of the President and Secretary, substantially as in the first contract.

The eleventh article defines the duties of the General Commissioner, who shall be chief executive officer of the Association, and as the representative of its members both severally and jointly, shall act for them in all matters which come within the jurisdiction of the Association, in conformity with the requirements of the contract, and the instructions of the several committees

provided for. The General Commissioner shall also take charge of the Reports and Claims, and appoint such clerks and claim agents as may be necessary.

The twelfth article provides that the Board of Arbitration shall hear and determine all questions submitted to them under the Association agreement, or by consent of the parties members of the Association; and the decision of the Board of Arbitration shall be final and conclusive.

The thirteenth article defines the duties of the Auditor, who shall have charge of the Clearing House, and shall keep full and accurate accounts of all joint traffic, making reports of the same to all the members of the Association. He shall keep a ledger account with the General Commissioner, and with each member of the Association, from which he shall furnish each company a statement of their account monthly, showing the debits and credits to them at each point at which business is apportioned. He shall furnish copies of a general balance-sheet monthly to the Executive Committee and General Commissioner, who shall cause settlements of balances to be made promptly.

The sixteenth article provides that when all parties interested in the joint traffic at any point are willing to maintain rates without apportionment of the business, no apportionment shall be required; but if any one of the initial roads insists upon apportionment, the matter shall be referred to the Board of Arbitration to determine whether or not such apportionment shall be made.

The seventeenth article provides that on all business apportioned on the basis of revenue, there shall be deducted as an initial charge and deposited to the credit of the General Commissioner by the company which receives the freight, an amount equivalent to twenty per cent. of the revenue to be divided, such deposit to be

made in such bank or banks as the Commissioner shall designate, subject to his order. The amount so deposited shall be credited by the Auditor to the companies or lines by which they are contributed, and shall constitute a fund which shall be applied to the payment of any balances due by such companies; but after settlement of such balances, if there be any remainder, it shall be returned to the companies to whom it belongs.

The eighteenth article provides that the Auditor shall be furnished with copies of all manifests issued by the companies, members of the Association, for freights that are shipped from or destined to points at which the business is divided by apportionment. The tonnage books of every company in the Association shall be open at all times to the inspection of the Auditor, or such agent as he may from time to time appoint.

The nineteenth article provides that any apportioned business—cotton and any other freight which it may be practicable to divide in kind, shall be so divided, and not by allotment of revenue. Each company or line shall be required to carry its allotted proportion as nearly as possible, settlements to be made monthly except when otherwise specially agreed between the parties interested. No penalty shall be imposed upon a company or line which carries an excess, for the benefit of any company or line that refuses or wilfully neglects to carry its allotted proportion.

The twenty-first article provides for equalizing any difference in the rate or premium for insurance against marine risks, and authorizes rail and water lines in competition with all-rail lines to issue insured bills of lading.

The twenty-second article provides that the Executive Committee shall organize such a system for the rendition of tonnage and revenue reports of the joint traffic,

as shall enable the General Commissioner to be at all times informed of the movement thereof, in order that he may promptly detect any violation of rates, and keep the several companies informed as to whether they are in excess or deficit.

The twenty-fourth article reads:

"Members of the Association are forbidden to reduce the rates made by the Rate Committee on the plea that they are violated by others, or because of any violation of agreements, or because of the action of any outside line. All such cases of violation shall be reported to the General Commissioner, whose duty it shall be to check such violations if possible, and in case he cannot do so he shall call the Executive Committee together, who shall use their influence to have such offending member or members conform to the agreements and rules.

"Whenever the General Commissioner shall have reason to believe that the rates established by the Rate Committee are not being fully maintained by any line or lines, or any transportation company or companies, members of this Association, it shall be his duty to make a full investigation of the facts in such cases, and if in his judgment there has been any violation of this agreement on the part of said member or members of the Association, he shall submit the evidence in such cases to the Board of Arbitration; and if the Board of Arbitration shall find, after a full hearing of the case, that such members are guilty of violating this agreement, as charged by the General Commissioner, it shall impose such penalties therefor as it may deem proper and necessary to secure the maintenance of the rates of this Association, and the General Commissioner shall enforce such penalty.

"The Board of Arbitration shall make such rules of procedure for the trial of such cases as it deems proper."

The above agreement was modified in 1887, when the Act to Regulate Commerce took effect—the article providing for a money division being eliminated. The physical division, however, was continued, by advice of coun-

sel that such division was not prohibited by the fifth section of the Act. In order to provide for the punishment of offending members for violations of the agreement, a fund known as the penal fund was created, by requiring a deposit with the Association of $5 per mile of road, not exceeding $5,000 in the aggregate for any one road. The application of the Sherman Act to the railroads of course put an end to these provisions.

TRUNK LINE ASSOCIATION.

The traffic conditions in the North and Northwest in 1876 and 1877 were as bad, or perhaps worse, than those of the territory of the Southern Railway and Steamship Association in 1875. The railroads in those sections were in a much better condition physically and financially. The volume of their traffic, and their earnings per mile of road, were considerably larger than those of the southern railroads. But the long business depression which followed the panic of 1873 had greatly diminished their earnings, and the strenuous efforts of each company to secure for itself a larger share of competitive traffic, had resulted in fierce and long-continued rate-wars.

The consolidation of the roads forming the New York Central and Hudson River Railroad was completed in 1860, and after 1874, when the Baltimore and Ohio Railroad Company had extended its road to Chicago, a fierce struggle took place for through traffic, both east and west bound, between the New York Central and Hudson River Railroad, the Erie Railway, the Pennsylvania Railroad and the Baltimore and Ohio Railroad—each road endeavoring to get an advantage over the others in the relative position of the respective ports they serve, and especially in the matter of export grain.

This controversy was temporarily settled in April, 1877, by the execution of the following contract, establishing differentials on competitive east and west bound business:

"Memorandum of agreement made this 5th day of April, A. D. 1877, between the New York Central and Hudson River Railroad Company, the Erie Railway Company, by H. J. Jewett, Receiver, the Pennsylvania Railroad Company and the Baltimore and Ohio Railroad Company, WITNESSETH:

"To avoid all future misunderstanding, in respect to the geographical advantages or disadvantages of the cities of Baltimore, Philadelphia and New York, as affected by rail and ocean transportation, and with the view of effecting an equalization of the aggregate cost of rail and ocean transportation between all competitive points in the west, northwest and southwest, and all domestic or foreign ports reached through the above cities; it is agreed:

"FIRST.—That in lieu of the percentage difference heretofore agreed upon, there shall be fixed differences upon the rates on all eastbound traffic from all competitive points beyond the western terminus of the trunk lines, whether on freight shipped for local consumption or shipped locally, and afterward exported or shipped for direct export. These differences shall be as follows:

"Three (3) cents less per hundred to Baltimore, and two (2) less per hundred to Philadelphia than the agreed rates established from time to time to New York, and all such traffic shall be billed at the rate thus fixed and no export or other drawback shall be paid thereon; it being further agreed that the cost to the shipper of delivering grain at each port from the terminus of each of the roads, to the vessel in which it is exported, as well as the number of days free storage allowed thereon, shall be the same.

"SECOND.—That the rates to Boston shall at no time be less than those to New York on domestic or foreign freights.

"THIRD.—Should rail and ocean steam through bills of lading be issued, neither of the parties hereto will accept as its proportion, less than its current local rates to its seaboard termini; but no joint rail and ocean sail bills of lading shall be given or recognized by the parties hereto.

"FOURTH.—That on all westbound traffic passing over the roads of the parties hereto, from competitive points, at or east of their respective eastern termini, to all competitive points west, northwest or southwest of their western termini, the differences in rates from Baltimore and Philadelphia below New York shall, on third class, fourth class and special, be the same as the differences fixed on eastbound business, and on first and second classes eight (8) cents less per hundred from Baltimore and six (6) cents less per hundred from Philadelphia than the agreed rates from New York, and that after existing contracts governing foreign business can be terminated, neither of the parties hereto will accept as its proportion of the through ocean, steam and rail rates, less than the established local rates.

"FIFTH.—All agreements inconsistent herewith are hereby annulled.

"In witness whereof, the parties hereto have affixed their signatures, the day and year aforesaid, to this agreement, which is intended to be permanent; but if either party desires modification, three months' notice must be given of such desire, said modification to be made by mutual agreement."

On June 8, 1877, the New York Central, Erie, Pennsylvania, and Baltimore and Ohio Railroad Companies entered into an agreement "for the purpose of maintaining reasonable and uniform rates of freight to all shippers, and of preventing unnecessary and injurious competition."

The agreement covered all westbound freights from and through New York, whether local or competitive, to

points beyond and including Buffalo, Black Rock, Suspension Bridge, Erie, Dunkirk, Salamanca, Pittsburgh, Wheeling, Belleaire and Parkersburg; and it provided for a physical division of traffic, each company party to the contract being allotted a certain percentage of the freight covered by the contract.

A Joint Agent, afterwards termed a Commissioner, was appointed, whose duty it was to make up accounts from waybills forwarded to him, of the proportion of the freight carried by each party, and to require the parties that had carried an excess of each class above the agreed percentage, to deliver such excess to the parties in deficit for the purposes of equalization.

The agreement became effective July 1, 1877. It covered only westbound freights from and through New York. But in 1878, Boston westbound freight, and in 1879, Philadelphia and Baltimore westbound freight, were placed under the jurisdiction of the Commission. In March, 1882, the agreement was revised so as to cover the eastbound as well as the westbound traffic.

The Trunk Line Association contract was from time to time modified and strengthened. On November 6, 1885, a new contract was executed between the Grand Trunk Railway of Canada, the New York Central and Hudson River Railroad Company, the Delaware, Lackawanna and Western Railroad Company, the Pennsylvania Railroad Company, and the Baltimore and Ohio Railroad Company.

It begins with the preamble:

"WHEREAS, past experience has fully established the fact that the joint action of competing railroad companies in establishing and adhering to uniform rates of transportation for like services to the public is necessary in order to avoid the evils of unjust discrimination and fluctuating rates, so injurious to commercial as well as to the railroad interests;

THEREFORE, the parties above named enter into the following contract for the purpose of jointly establishing tariffs over their respective roads on competitive traffic, both passenger and freight, * * * and of publishing said tariffs and strictly maintaining the same."

The main provisions of the contract are, that all measures necessary to carry out its purposes shall be taken jointly by the parties directly interested; that no party shall take separate action in any matter affecting the interest of one or more of the other parties, and that all questions upon which they cannot agree shall be determined by arbitration.

The parties agree to enter into arrangements with other connecting roads for the establishment of through tariffs, upon condition that the connecting roads will strictly adhere to established tariffs and comply with established rules and regulations, and that the Trunk Lines will refuse to become parties to any traffic arrangements with connecting roads that decline or fail to co-operate with them. Each Trunk Line undertakes to control the maintenance of agreed rates on its own road, as well as over affiliated roads.

The contract provides for a division of traffic "in order to secure the maintenance of agreed tariffs by removing the motive for their violation openly or secretly." Such contract to take effect November 7, 1885, and continue in full force and effect until December 31, 1886, and from year to year thereafter, unless terminated by any party thereto by giving three months' prior notice.

The main features of the organization are:

TRUNK LINE PRESIDENTS' COMMITTEE.

This Committee to be composed of the Presidents or chief executive officers of the parties to the contract. It is presided over by a Chairman elected from its own

members, and has power to decide upon all measures necessary to carry out the purposes of the contract. All joint measures upon which the Presidents' Committee cannot agree to be finally decided by arbitration.

Trunk Line Executive Committee.

To be appointed by the Presidents' Committee, and to consist of an officer of each company, and which is charged with the duty of carrying out in detail, the instructions of the Presidents' Committee. The Presidents' Committee shall also appoint a Commissioner, who shall act as Secretary of said Committee, and as Chairman of the Trunk Line Executive Committee, and shall carry out any measures agreed upon or decided by arbitration, acting as their executive officer. In case the Trunk Line Executive Committee is not unanimous upon any question, and the Commissioner failing to secure an agreement, the question at issue to be submitted to the Presidents' Committee for their action; and they failing to agree, to arbitration. Any question upon which the Trunk Line Executive Committee cannot agree, and which requires immediate decision, shall be decided by the Commissioner at the request of two-thirds of the members of the Committee; but the Commissioner's decision shall be temporary, and subject to the final action of the Presidents' Committee, or arbitration.

Freight Committees.

The Trunk Line Executive Committee shall appoint a special committee for the Freight Department, to be called the Freight Committee, and consisting of the Traffic Managers or General Freight Agents of the respective companies, parties to the contract. This Committee shall transact such business as may be delegated to it. A Commissioner appointed by the Executive Com-

mittee shall preside over the Freight Committee. In case of failure to agree in said Freight Committee, the question at issue shall be referred to the Executive Committee, etc.

Sub-Committees.

The Freight Committee may appoint sub-committees for special purposes as may be deemed necessary to facilitate the transaction of business.

Arbitration.

A permanent Arbitrator (or Board of Arbitration) shall be appointed by the Trunk Line Presidents' Committee, to whom shall be submitted for final decision all questions arising under the contract upon which the parties thereto cannot agree. It shall be the duty of said Arbitrator to devote his whole time to the duties of the office, to attend the meetings of the various committees as far as practicable, and to keep himself informed as to the facts bearing on all questions which are likely to arise, and which he may be called upon to adjudicate.

Questions upon which the Trunk Line Executive or Freight Committees cannot agree, may also be decided by the Chairmen of the respective committees, when submitted to them by agreement of the parties interested.

Relations with Affiliated Roads.

To facilitate transaction of business between the Trunk Lines and their affiliated roads, the chief managing officers of said affiliated roads, and the members of the Trunk Line Executive Committee shall constitute a committee to be called a Joint Committee, whose duty it shall be to establish all through tariffs and classifications, to agree upon divisions of through rates, and to make such rules and regulations as may be deemed neces-

sary to secure uniformity and stability. The Chairman of the Trunk Line Executive Committee shall act as Chairman of the Joint Committee, with the same duties as under the organization of the Trunk Line Executive Committee. The Joint Committee shall appoint the following sub-committees:

Eastbound Classification Committee,
Cotton Rate Committee,
Tobacco Rate Committee,

and such other committees as may be considered necessary to facilitate the transaction of business.

If the Joint Committee cannot agree upon joint tariffs, etc., the Trunk Line Executive Committee shall decide the question under its rules.

General Rules.

Each Trunk Line shall not only conform to the intent and spirit of the contract, so far as its own road is concerned, but shall also take responsibility for the acts of its affiliated roads. The rules provide for the investigation of cases of violation of the established tariffs, and for such measures as will remove the cause of complaint. One of the rules prohibits the party complaining from meeting any alleged reduction in rates, or taking any separate action, pending the investigation and action by the Executive Committee.

One of the rules authorizes the Trunk Line Executive Committee, under the direction of the Presidents' Committee, to enter into agreements with competing roads not parties to the contract, for the establishment of joint tariffs, and the maintenance of the same. But none of the affiliated roads shall enter into arrangements with roads whose tariffs affect the tariffs established under the Trunk Line contract, except upon condition that such roads shall maintain the said tariffs.

The concluding section, No. 43, provides that none of the Trunk Lines, nor their affiliated roads, shall make reductions in established tariffs on the plea that some competing road, not party to the contract, has made reductions affecting said tariffs; but that the case shall be reported through the Commissioner to the Executive Committee for joint action.

This contract was modified in 1887 so as to conform to the Interstate Commerce Act, the provisions for a division of business being eliminated.

The revised contract provided for a Trunk Line Board of Presidents, consisting of the Presidents or chief officers of the companies, parties to the agreement, with a Chairman elected from its own members; a Trunk Line Executive Committee, appointed by the Board of Presidents, and to consist of a Vice-President of each company; and a Commissioner, who shall act as Secretary of the Board of Presidents and as Chairman of the Trunk Line Executive Committee. All measures upon which the Board of Presidents or the Trunk Line Executive Committee cannot agree to be submitted to arbitration.

The Trunk Line Executive Committee shall appoint two sub-committees, one for the Freight Department, and to be called the Freight Committee, and consisting of the Traffic Managers or General Freight Agents, and one for the Passenger Department, to be called the Passenger Committee; with a Commissioner for the Freight Department, and a Commissioner for the Passenger Department, who shall act as Chairmen for their respective committees. The Freight and Passenger Committees may appoint sub-committees for special purposes.

The contract also provides for the establishment of a statistical bureau, which, under the direction of the Commissioner, shall compile statistics of the traffic with which the Trunk Line Association deals.

It provides for a Joint Committee for the purpose of facilitating the transaction of business between the members of the Trunk Line Association and the members of the Central Traffic Association, and other roads and companies with which the Trunk Lines exchange traffic, and who desire to co-operate with the Trunk Lines.

It is made the duty of the Joint Committee to establish joint tariffs and classifications, and to make such rules and regulations affecting the tariffs as may be necessary.

The Chairman of the Trunk Line Executive Committee shall act as Chairman of the Joint Committee; and the Chairman of the Central Traffic Association shall act as Western Vice-Chairman, and the Commissioners of the Freight and Passenger Departments of the Trunk Line Executive Committee shall act as the Eastern Vice-Chairmen, of the Joint Committee. The Joint Committee shall appoint such other committees as may be considered necessary to facilitate the transaction of business.

The Trunk Line Executive Committee shall act as the Standing Committee of the Joint Committee. If the Joint Committee cannot agree upon joint tariffs or upon rules or regulations affecting such tariffs, or upon the proportion of rates and fares with common connections of two or more Trunk Lines, the Trunk Line Executive Committee shall decide the question under its rules, after hearing the arguments of the various parties interested.

THE JOINT EXECUTIVE COMMITTEE.

During 1877 the representatives of certain western connections of the Trunk Lines held meetings for the purpose of putting an end to rate-cutting and other irregularities in the conduct of their eastbound business.

It was found that these objects could not be attained without the co-operation of the Trunk Lines, and a committee was appointed to petition the Trunk Lines to enforce the maintenance of eastbound tariffs. This the Presidents of the Trunk Lines agreed to do, and they notified their connections that they would not participate in any cuts by the Western railroads, but would charge their local rates on all shipments that were contracted for at less than established through rates.

At a meeting of Western Lines in December, 1877, the Western Executive Committee was formed, with J. N. McCullough as Chairman, and N. Guilford as Commissioner. But all efforts to stop rate-cutting having failed, an agreement was made at a meeting held in New York in March, 1878, to divide the eastbound business from Chicago, Milwaukee, Detroit, Port Huron, Toledo, St. Louis, Louisville, Mississippi River points, Cincinnati, Indianapolis and Peoria.

A number of meetings were held during 1878 for the purpose of determining the percentages of division.

These efforts to stop rate-cutting having proved unsuccessful, the representatives of Western roads concluded that arrangements for dividing traffic could not be made effective by separate action; so a Joint Executive Committee of the Western and Eastern Lines was formed in December, 1878. Albert Fink was elected Chairman, retaining, however, his position as Commissioner of the Trunk Lines; and N. Guilford was elected Secretary.

The rules of this organization provided:

That the office of the Committee should be in New York City.

That the object of organization was the maintenance of agreed rates.

That the Committee should have cognizance of all

through competitive freight and passenger traffic in both directions.

That any case brought before the Committee that failed to receive its unanimous action, should be decided by the Chairman upon its merits, and that his decision should have the same force and effect as the unanimous vote of the Committee.

That all negotiations between the Committee and companies not represented by the Committee should be carried on solely through the Chairman.

That western members of the Joint Committee should represent and act for all western companies which the Western Executive Committee had heretofore represented or acted for.

That parties to the agreement were not to take any steps to meet alleged abatements or evasions of rates by other lines until the Committee had acted thereon.

That the Committee was authorized to enforce against all companies, such rules and regulations as it might from time to time adopt.

At a meeting of representatives of traffic associations, held at Chicago, October 20 and 21, 1886, Commissioner Blanchard submitted a memorandum of rules and regulations for the conduct of the Joint Committee, proposed by Commissioner Fink and himself, and which were adopted.

The memorandum refers to the fact that the Trunk Line organization and rules provide for the establishment of a Joint Committee for the purpose of establishing joint tariffs with all roads with which the Trunk Lines have traffic arrangements, and that the organization of the Central Traffic Association provides that through joint rates and fares between points in its territory and points in the territory of other similar organizations, shall be made by co-operation, and issued or authorized

by the Central Traffic Association in its territory; and that, in order to carry out these provisions in the organizations of both associations, the members of the Trunk Line Executive Committee, and of the Central Traffic Association, and all companies having traffic arrangements with both organizations, under their several contracts, who are not members of these organizations, shall constitute a Committee to be called the Joint Committee. It is made the duty of the Joint Committee to establish all joint tariffs, both freight and passenger, on traffic passing through the western termini of the Trunk Lines; also all classifications and other conditions governing said tariffs; to agree upon division of through rates and through fares, where such divisions affect maintenance of uniform tariffs between competing lines, and to make such other rules and regulations as are necessary to secure uniformity and stability in joint tariffs.

That the Commissioner of the Trunk Line Executive Committee shall act as Chairman of the Joint Committee.

That the Commissioner of the Central Traffic Association shall act as the Western, and the Commissioner of the Freight or Passenger Department of the Trunk Line Executive Committee shall act as the Eastern, Vice-Chairman of the Joint Committee.

The Western Vice-Chairman, with the concurrence of the Chairman, has authority to appoint such sub-committees as may be necessary to facilitate the transaction of business, from representatives of the roads west of the western termini of the Trunk Lines. Said committees shall report to the Chairman and the Western Vice-Chairman of the Joint Committee, and their reports shall be submitted for the vote of all the members of the Joint Committee. In like manner the vote of the Joint Committee shall be taken upon any question presented to it by the Trunk Line Executive Committee or by the Cen-

tral Traffic Association. If the vote upon any question is not unanimous, the Trunk Line Executive Committee, under its rules, shall decide the question at issue, after duly considering the vote of each member of the Joint Committee.

The Joint Executive Committee continued in operation until the formation, in 1886, of the Central Traffic Association, when it was known as the Joint Committee, of which J. F. Goddard was Chairman, and G. R. Blanchard was Vice-Chairman. During the year 1893, Aldace F. Walker was Chairman, and Messrs. Goddard and Blanchard Vice-Chairmen. During 1894-1895, Mr. Goddard was Chairman, and Mr. Blanchard Vice-Chairman. On January 1, 1896, the Joint Committee was superseded by the Joint Traffic Association.

JOINT TRAFFIC ASSOCIATION.

In 1889 Albert Fink resigned as Commissioner of the Trunk Line Association, and J. F. Goddard was elected to succeed him, and the organization continued until 1895. During that year the Presidents of the Trunk Lines had several meetings, which resulted in the organization of the Joint Traffic Association, taking effect January 1, 1896.

The Association had jurisdiction over all competitive traffic (coal, coke, iron-ore, mill-cinder, limestone and petroleum being excluded) passing to, from or through the western termini of the Trunk Lines, and all traffic which may pass through other junctions of the companies parties to this agreement, except traffic destined to or coming from points south of the south line of the Chesapeake and Ohio Railway.

FIRST.—The contract provides for a Board of Control, consisting of the Presidents of the companies form-

ing the Association. Each member of the Board was entitled to one vote, and it required three-fourths of the entire number of authorized votes to adopt any proposition coming before the Board of Control.

SECOND.—It provided for a Board of Managers, to consist of not less than nine members, each of the nine systems, parties to the agreement, designating one member. Their action as to rates and fares (except differentials) was subject to appeal only to the Board of Control. The Board of Managers shall appoint not more than three Commissioners, and shall define their powers and duties. The powers conferred upon the Managers shall be so construed and exercised as not to permit a violation of the Act to Regulate Commerce, and the Managers shall co-operate with the Interstate Commerce Commission to secure stability and uniformity in rates, fares, charges and rules established hereunder.

The Managers were charged with the duty of securing each company, party to the agreement, equitable proportions of the competitive traffic covered by the agreement, so far as can be legally done.

THIRD.—The contract provides for a permanent Board of Arbitration, consisting of three disinterested persons, to which appeals shall be made, and which shall decide all differences between the parties to the agreement as to any lawful measure necessary to carry out the objects of the Association, except as to rates and fares. Pending decisions by the Arbitrators, the decisions and orders of the Board of Control and Managers shall prevail.

The Board of Control elected G. R. Blanchard as Commissioner. It was against this Association that the Government brought suit under the Sherman Act, and

which resulted in the decision of the Supreme Court of the United States in October, 1898, declaring the Association to be illegal.

The Joint Traffic Association continued in operation until about December, 1898.

CENTRAL TRAFFIC ASSOCIATION.

In the early part of 1886, the western connections of the Trunk Lines formed the Central Traffic Association, and elected G. R. Blanchard Commissioner.

This Association operated west of the Trunk Lines' termini, east of the Mississippi River, and north of the Ohio River.

The object of the Association was the maintenance of reasonable rates, thereby preventing unjust discrimination, and fairly distributing competitive traffic between the parties. Business included all freight and passengers originating at or west of certain points hereinafter named, which may be destined to or through the western termini of the Trunk Lines (eastbound business).

The following were some of its rules and regulations, suggested by J. W. Midgley and adopted by the Association:

4. Provides for division of business by sectional or group pools at Chicago, Peoria, St. Louis, Cincinnati, Indianapolis, Toledo, Detroit, and other points as may be agreed upon.

6. The conduct of the grouped pools to be left, as far as practicable, to local committees.

7. Business of the Association shall be conducted by a Board of Managers, to consist of the managing officer of each road, party to the Association.

8. In matters wherein co-operation of Trunk Lines is requisite, the Board of Managers, or a committee to be designated by it, shall, in conjunction with the Executive Committee of the Trunk Lines, form a Joint Executive Committee, which shall meet at the call of the Commissioner of the Trunk Lines.

9. A Commissioner may be appointed by the Association.

11. All questions brought before the Board of Managers shall be decided by a majority vote, except such as relate to revenue, which shall require a unanimous vote for their adoption.

13. The Commissioner may direct a road or roads that may be in excess, to deliver to the road or roads that may be in deficit, as much tonnage of any or all classes as may be required to make good the shortage.

14. Any controversy arising during the effort to agree on percentages, and also for the settlement of all differences that may arise, shall be determined by a plan of arbitration which shall be adopted.

17. Tonnage and revenue statistics shall be kept in the office of the Commissioner of the Trunk lines at New York.

18. Rates on eastbound business from the territory of the Association shall be made by the Association, and issued by the Commissioner.

In the latter part of 1886 this Association had as members forty railroads, operating 18,300 miles, whose earnings from freight in 1885 were $79,337,000, and from passengers, $32,469,000, or $111,806,000.

CENTRAL TRAFFIC ASSOCIATION.

Owing to the large area of the territory of this Association, the great mileage, the great number of its members, the competition between them, the diversity of their interests, and the competition with water routes both by lake and river, the operation of the Association involved greater difficulties and complications than those of any other association in this country; and even so able and experienced a traffic official as G. R. Blanchard found himself unable to cope with these difficulties. In one of the Commissioner's reports to the Association, in October, 1886, he calls attention to the fact that while the Trunk Line Commission comprises only seven railroads, with but two competitors outside of it, and has only two freight pools, including all eastward short and long haul local and through tonnage, and one westwardly, covering only New York City, the Central Traffic Association have six eastbound freight pools, and ten others recommended to be formed; that while the eastwardly Trunk Line pool has only nineteen junctions, which are all combined for settlement purposes, there are five hundred and seventy-six junction points in the district of the Central Traffic Association, from two hundred and eighteen of which eastward percentages are recommended; that while the Trunk Lines have only two competitors outside of its Association, the Central Traffic Association has in its territory more than forty railroads that are not members. He also calls attention to the fact that the Commissioner's powers are extremely limited, and that agreements authorizing him to divert freight for the purpose of defeating cut rates are nullified by the refusal of the parties to carry them out.

A report made in September, 1886, by a committee on the revision of the Association agreement, contains some interesting statements of the working of different methods of dividing traffic.

The first agreement for the control of through eastward traffic from the territory of the Association was made in 1879, and provided for a physical division—the excesses or deficits of tonnage being adjusted between the carriers so as to allow the actual transporters of an excess, the assumed cost of carrying the various classes of such excess, or by turning over to the railroads that were in deficit in one class, so-called converted or equated tonnages in other classes. This plan failed to accomplish the object of the division. Not only did the roads that were in deficit receive less than their share of the revenue allotted to them, but the plan failed to remove the motive for rate-cutting. For as the roads in excess were paid an assumed cost of transportation in addition to receiving their regular percentages of traffic, they were perfectly willing to struggle for more business with the view of securing increased percentages in a new division, while the roads in deficit naturally struggled to recover their lost traffic.

The next forms of contract for a division of eastbound traffic, made in 1882 and 1883, came nearer to a gross money adjustment by providing that percentages of the New York rate should be paid for current over-carriage: but as the final cash settlements reinstated the former allowances of assumed cost for carrying the various classes, the same difficulties were experienced as under the first plan.

Under the third plan, all uniformly averaged gross earnings of the competing lines on eastbound through traffic were divided, and actual gross settlements were made bi-monthly, the balances so found being then paid for over-carriage; and these balances could not be recovered except by an under-carriage to an equal amount in subsequent periods. This plan is known as a gross money pool, and proved to be the most effectual of all methods of dividing traffic.

The Central Traffic Association was succeeded in April, 1896, by the Central Freight Association, which is practically a continuation of the freight department of the Central Traffic Association.

WESTERN AND SOUTHWESTERN TRAFFIC ASSOCIATIONS.

During the time of the operation of the Joint Committee and the Central Traffic Association, several traffic associations were formed in the West and Southwest. One of them was the Interstate Commerce Railroad Association, of which ex-Interstate Commerce Commissioner Aldace F. Walker was Commissioner. It was formed in 1889, but its existence was short. It was superseded by the Western Traffic Association, which consisted of various railroads extending westward of a meridian drawn from Lake Superior through Chicago to the Gulf. It had several divisions, such as the Lake Division, which extended as far as the Missouri River Line, of which J. W. Midgley was Commissioner; the Texas Division, known as the Southwestern, J. N. Faithorn, Commissioner, which covered the territory from St. Louis to all points in Texas; the Trans-Missouri Division, James Smith, Commissioner, consisting of the Trans-Missouri Lines as far West as and including Colorado; and the Trans-Continental Division, E. P. Vining, Commissioner, which included all traffic to and from the Pacific Slope and terminals on the Coast.

Aldace F. Walker was the Chairman of the Western Traffic Association. The organization had an Advisory Board, consisting of the President and one Director of each constituent company; and the Board of Commissioners was empowered to decide all controversies pending their submission to the Advisory Board.

WESTERN AND SOUTHWESTERN TRAFFIC ASSOCIATIONS.

In 1885 the Trans-Continental Association was organized, with George W. Ristine as Commissioner. It continued until April, 1893, when it was superseded by the Trans-Continental Freight Rate Committee, which, in its turn, was superseded in 1897 by the Trans-Continental Freight Bureau.

The Texas Traffic Association was formed in July, 1885, with J. Waldo as first Commissioner. He was succeeded by J. N. Faithorn.

The Trans-Missouri Association was first organized in March, 1889; and it was against this organization that suit was commenced which resulted in the decision of the U. S. Supreme Court of March 22, 1897, dissolving the same.

In the course of a few years additional traffic associations were formed in different sections of the country, and several changes took place in the older associations.

The following is a list of the main traffic associations in operation January 1, 1897, or about a year before the decision in the Joint Traffic Association case. Since that time local freight and statistical bureaus have taken the place of most of the associations:

Name of Association.	Commissioner or Chairman.
Joint Traffic Association	George R. Blanchard.
Trunk Line Association	J. F. Goddard.
Central Freight Association	J. F. Tucker.
Middle States Freight Association	C. W. Bullen.
Western Freight Association	J. W. Midgley.
Southwestern Traffic Association	L. F. Day.
Southern States Freight Association	H. S. Haines.
Southeastern Mississippi Valley Freight Rate Association	M. P. Washburn.
Southern Freight Association	S. Frink.
Associated Railways of Virginia and the Carolinas	W. H. Fitzgerald.

The underlying principle of the traffic associations is the same as that which forms the basis of civil society. Each member voluntarily agrees to refrain from committing any acts that might result in injury to the association, or of any member thereof, and otherwise retaining that free individuality so essential to progress.

We have seen that the object of these associations is the establishment and maintenance of tariffs of uniform rates. The methods to attain this object that were adopted by the important associations were very similar: but the organizations themselves varied with the traffic conditions and circumstances prevailing in different sections of the country.*

RAILROAD CONSOLIDATIONS.

Consolidations have proved a very important factor in rate regulation by the railroads; and their causes and effects will be the subject of one of the most interesting as well as instructive chapters in a future history of the development of railroads, from their modest beginning about seventy years ago with a few isolated, short, local roads, aggregating a few hundred miles in length, to the present network of about 208,000 miles, covering the entire country, and organized into strong systems that give the people the most efficient service and the lowest rates in the world.

Most of the railroads in this country were built by private enterprise and capital, and, generally, in anticipation of the needs of the people; so that the traffic necessary to support them had to be created largely through the instrumentality of the roads themselves. But it was soon found that short, local roads did not have sufficient

* In concluding the inquiry of this branch of the subject, it may not be amiss to state that I am conscious of having treated the traffic associations and their organizations more fully and in detail than can be agreeable to the average reader. I have thought, however, that this information might prove of historic interest to some future students of the railroad problem.

strength to become important factors in the development of the resources of the country; and as these resources did not afford a sufficient volume of traffic to support them, a large number of them, after a struggle for existence, passed into the hands of receivers.

From 1876 to 1889, 448 roads (46,700 miles), were sold under foreclosure. On June 30, 1894, 192 roads were in the hands of receivers, having a capital of two and one-half billions of dollars, or one-fourth the railroad capital of the country, and with a mileage of 40,818 miles. And on June 30, 1895, 169 roads, with a mileage of 37,855 miles, were in the hands of receivers.

While these bankruptcies caused enormous losses to investors in railroads, the general public was the gainer; for every reorganization strengthened the railroad systems. Additional capital was furnished for the purchase of the bankrupt railroads, and to put them in good condition; in extending them; and in forming, by consolidations, strong through lines that afforded the public improved facilities, and enabled them to send their products to distant markets. At the beginning of these consolidations, and for some years thereafter, they excited a fear on the part of the public that they might become great transportation monopolies, and prove injurious to the public welfare. But experience has shown that these fears were groundless, and that these consolidations conferred great benefits upon the country without any serious disadvantages. It is not too much to say that the marvelous development of the resources of this country, and the growth of commerce and manufactures during the last fifty years, are due in a great measure to the unparalleled expansion of its railway system, and especially to the consolidation of the weak, short, local lines into strong through lines and railroad systems. And it is highly probable that the same economic conditions which have

heretofore resulted in these consolidations, will continue to operate in the future.

The natural consequence of the laws prohibiting the regulation of rates by agreement between the carriers, is to stimulate the effort of self-protection by further consolidations; and it may be that instead of single railroads, whole systems of roads will be consolidated, where State and Federal laws place no obstacles in the way.

As stated above, the elimination of some of the weaker railroads by consolidation has, to a considerable extent, facilitated the regulation of rates by the railroads themselves. As these weak roads were unable to secure a share of the competitive traffic at rates equal to those made by the stronger lines, they were necessarily compelled to cut rates. The agreements for a division of traffic, while they did not entirely put a stop to rate-cutting, had at least a restraining influence; and when that restraint was removed by the prohibition to divide traffic, the weaker roads again became disturbers of the peace.

The following statement made by Hon. Martin A. Knapp in 1895 is very interesting as showing what has been the effect of consolidations in the New England States. At that time Mr. Knapp was a member of the Interstate Commerce Commission, of which he is now Chairman: his statement was made in a correspondence with Mr. Chandler, and is printed in Senate Document No. 39, Fifty-fourth Congress:

"In the New England States the process of absorption in one way or another, has gone on, until there is now practically no competition in the railway service in that section. So far as I am aware, this consolidation has not resulted in any increase in charges; but, on the contrary, has been attended by a considerable reduction in rates, by improved facilities, and the better accommodation of the public. Fewer complaints come to us from that re-

gion than from any other part of the country. My observation and inquiries lead me to believe there is less dissatisfaction with railroad charges and practices in New England, than is found elsewhere in the United States, and that the people in that territory will not welcome a return to competitive conditions."

The concluding part of Commissioner Knapp's statement also confirms what we have seen to be the effect of unrestrained competition.

The following extract from an article on railway statistics, in the Sixth Annual Report of the Commission (for 1892), shows the extent to which consolidations had been effected in a single year, to June 30, 1891:

"There were on June 30, 1891, 1785 railway corporations, of which 889 were independent companies and 747 were subsidiary companies, the remainder being private lines. The report shows that 16 roads have been abandoned during the year and that 92 companies, representing a total mileage of 10,116.25 miles, have disappeared by purchase, merger or consolidation. On June 30, 1891, there were 42 companies, each of which controlled mileage in excess of 1,000 miles, and 80 companies each of whose gross income exceeded $3,000,000. These 80 companies control 69.48 per cent. of the total mileage of the country, receive 82.09 per cent. of the amount paid by the public for railway service, and perform 83.76 per cent. of the total passenger service, and 82.66 per cent. of the total freight service of the country."

COMMUNITY OF INTEREST.

It is obvious that railroads operating in the same section of country have a natural community of interest, whether they are direct competitors between the same points, or whether they participate in competition between markets.

We have seen that reckless management of one of these roads must result in great injury to all the others. After

the destruction of efficient traffic associations by the interpretation of the Sherman Act, the managers of some of the roads adopted a plan of rendering the natural community of interest more effective in the practical operation of certain railroads, by acquiring a sufficient interest in the capital stock of these roads to entitle them to a voice in their management. So far the plan has had but a limited application; but it has worked fairly well in preventing friction, and in contributing in some degree to the better self-regulation of the railroads in the sections of the country where the experiment has been tried. Whether it will withstand the stress of the struggle for traffic in times of great business depression, remains to be seen. That community of interest can be considered a violation of the Sherman Act is not conceivable, for it is not a combination, nor is it in restraint of trade.

MERGERS.

In the Spring of 1901, the Northern Pacific Railway Company and the Great Northern Railway Company, two roads which were regarded as parallel and competing lines, united in purchasing nearly the entire capital stock of the Chicago, Burlington and Quincy Railway Company, and becoming joint sureties for the payment of the bonds of the Chicago, Burlington and Quincy Railway Company, whereby the purchase was accomplished.

In November, 1901, the Northern Securities Company was organized under the laws of the State of New Jersey, with a capital stock of $400,000,000. Shortly after its organization that company acquired a large majority of all the stock of the Northern Pacific Company, and also a majority of the stock of the Great Northern Company, paying for these stocks with its own stock.

A suit was brought by the United States against the Northern Securities Company in the Circuit Court of the

United States for the Circuit of Minnesota. On April 9, 1903, that Court held (four judges sitting) that all the stock of the Northern Pacific and Great Northern Railway Companies held and owned by the Northern Securities Company, was acquired in virtue of a combination or conspiracy in restraint of trade prohibited by the Sherman Antitrust Act. Its officers, agents, etc., were enjoined from voting the aforesaid stock, or from attempting to vote it at any meeting of the stockholders of either of the railway companies, etc. The decree, however, allowed the Northern Securities Company to return and transfer to the stockholders of the Northern Pacific and Great Northern Companies, respectively, all the shares of stock in either, which said Securities Company had received in exchange for its own stock.

An appeal having been taken from this decision to the Supreme Court of the United States, that Court on March 14, 1904, affirmed the decision of the lower court, four of the nine judges dissenting.

II.

REGULATION BY THE FEDERAL GOVERNMENT.

The Act to Regulate Commerce.

Until 1887, railroad regulation in this country had been confined within State limits. With the exception of the Act of June 15,* 1866, which authorized railroads to carry passengers and freight from State to State, to receive compensation for the service, and to connect with roads of other States so as to form continuous lines; and

* This Act of June 15, 1866, entitled: "An Act to facilitate Commercial, Postal and Military Communication among the States," is as follows:

"That every railroad company in the United States whose road is operated by steam, its successors and assigns, be, and is hereby, authorized to carry upon and over its road, boats, bridges and ferries, all passengers, troops, government supplies. mails, freight and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States, so as to form continuous lines for the transportation of the same to the place of destination."

Revised Statutes, Section 5258.

the Act of March 3, 1873, in respect to the carriage of animals from State to State, Congress had not exercised the power conferred by Article I, Section VIII, Paragraph 3, of the Federal Constitution, known as the Commerce Clause, viz.: "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Under authority of a resolution dated March 17, 1885, the President of the Senate appointed, March 21, 1885, a Select Committee of five Senators:

"To investigate and report upon the subject of the regulation of the transportation by railroad and water routes in connection or in competition with said railroads, of freights and passengers between the several States, with authority to sit during the recess of Congress," etc.

This Committee performed its duties in an admirable manner. It inquired into the causes of complaints then existing against railroad corporations, and endeavored to ascertain the opinion of the people as to what remedies could be applied by Congress; and for this purpose, it visited several important trade centers of the United States, and took testimony of the representatives of various interests. It also corresponded with the railroad commissions of the several States, boards of trade, chambers of commerce, agricultural societies, railroad managers, and men generally who were known to have given special attention to the transportation question.

The report of the Committee, made in January, 1886, is, in the opinion of the writer, the ablest document we have on the subject of railroad regulation by the Government. It is the most valuable contribution to the literature of the subject that we possess. It is a mine of useful informaion; indeed, it is a classic. Even now it can be read with great interest and profit by legislators and

people who desire to make themselves familiar with the railroad problem. While the development of the railroad system, and the great growth of traffic of this country since the report was made, have produced important changes in railway transportation, the principles that should govern in the regulation of railroads, so clearly, fairly and correctly set forth by the Committee, are not affected, and should be applied to any additional legislation that may be needed, allowance being made for changed conditions.

Congress, after careful consideration of the facts bearing on railroad legislation, and after an exhaustive discussion in both Houses, passed the Act to Regulate Commerce, approved February 4, 1887, and taking effect April 5, 1887.

Experience having disclosed some weak points in the Act, some of the articles were amended in 1889, and a new section was added March 2d of that year, giving the Circuit and District Courts of the United States jurisdiction to issue writs of mandamus compelling carriers to furnish cars or other transportation facilities. A supplementary act was approved February 11, 1893, compelling the attendance of witnesses, and the production of documentary evidence.

Another supplementary act was approved March 2, 1893, to promote the safety of employees and travelers upon railroads by compelling carriers to equip their cars with automatic couplers and continuous brakes, etc.

The Senate Select Committee, in its report, said:

"That a problem of such magnitude, importance and intricacy can be summarily solved by any master stroke of legislative wisdom, is beyond the bounds of reasonable belief."

While this is true, it is nevertheless a fact that the Act to Regulate Commerce, notwithstanding some imper-

fections, is a monument of legislative wisdom, and that the people of this country owe a debt of gratitude to the Forty-ninth Congress for inaugurating the Government regulation of railroads in a wise and statesmanlike manner. The amount of mischief that would have resulted from radical measures such as were, under pressure of popular prejudices, clamored for, it is impossible to conjecture. For example, if, notwithstanding the opinion of the Committee that the establishment of schedules of rates by Congress or by a Commission appointed by Congress is impracticable, Congress had seen fit to delegate to the Commission the power to make rates, what chaos and confusion would have followed the attempt to exercise such powers, and how injuriously such an experiment would have affected the commercial and industrial interests, as well as the interests of the owners of railroad properties!

The investigations of the Select Committee having shown that the principal cause of complaint against the transportation system of the country was based upon the practice of discrimination in one form or another, the Act to Regulate Commerce was designed mainly to abate this evil as far as practicable. The underlying purpose of the Act is to prohibit these practices, and to create the necessary machinery to attain that object.

In considering the provisions of the Act, it will be convenient to classify them as follows:

1. Regulation of rates. What the Act forbids.
2. Publicity of Rates.
3. Powers and duties of the Commission.
4. Enforcement of the Act. Penalties for Violation.

REGULATION OF RATES—WHAT THE ACT FORBIDS.

Sections one, two and three of the Act provide that charges for services rendered must be reasonable and just, and forbid any unjust and unreasonable charge, and any unjust discrimination by any special rates, rebates,

drawbacks or other devices, and any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic.

Section four forbids the charge of a greater sum for the shorter than for the longer distance over the same line in the same direction, under substantially similar circumstances and conditions.

Section five forbids the pooling of freights and the division of earnings.

Section seven provides for the continuous carriage of freights, and forbids any combinations or devices which prevent the continuous carriage of freights from point of shipment to place of destination.

Publicity of Rates.

Section six requires common carriers to print and keep open to public inspection their schedules of rates and fares, with classification of freight, terminal charges, and rules and regulations affecting rates. Schedules showing through rates to all points in the United States and to foreign countries must also be printed and kept open to public inspection. The Act forbids any deviation from the rates so published, and provides that ten days' public notice of an advance, and three days' notice of a reduction, be given. It also provides that carriers shall file with the Commission copies of their schedules of rates, fares and charges, and shall promptly notify the Commission of all changes made in the same. All contracts, agreements or arrangements with other common carriers, and all joint rates, fares and charges on continuous lines, must also be filed with the Commission; and no advance in such joint rates, etc., can be made except on ten days' notice to the Commission, and no reduction except upon three days' notice.

Powers and Duties of the Commission.

The Commission is required to execute and enforce the provisions of the Act. Section six confers power upon the Commission to prescribe the publicity of rates and the filing of tariffs. It has the power, and it is its duty, to inquire into the business of the carriers, and keep itself informed in regard thereto; and it can require the carriers to furnish full and complete information.

Section thirteen provides that the Commission shall have power to investigate, by such means as it shall deem proper, any complaints made by any firm, corporation, association, etc., of anything done or omitted to be done by any common carrier; and to institute an inquiry on its own motion in the same manner and to the same effect as though complaint had been made. It has the power to require the attendance of necessary witnesses and the production of documentary evidence, and to invoke the aid of courts to compel witnesses to attend and give testimony; and the claim that giving testimony may tend to incriminate the witness shall not excuse such person from testifying.

Section fourteen makes it the duty of the Commission to report in writing its findings of fact and its conclusion, with its recommendations as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured, such findings to be *prima facie* evidence in all judicial proceedings as to each and every fact found.

It has authority to inquire into the management of the business of the carriers, and keep itself informed as to the manner and method in which the same is conducted. It has the right to obtain from such carriers full and complete information necessary to enable it to perform its duties, and carry out the objects for which it was created. And it is authorized and required to execute

and enforce the provisions of the Act, and upon request of the Commission it shall be the duty of any District Attorney of the United States, to whom the Commission may apply, to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of the Act, and for the punishment of all violations thereof; and it shall have power to require, by subpœna, the attendance and testimony of witnesses, and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation.

Section fifteen provides that if, in any case in which an investigation shall be made by the Commission, it shall be made to appear to the satisfaction of the Commission that anything has been done or omitted to be done in violation of the provisions of the Act, or of any law cognizable by the Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by any other parties aggrieved because of such violation, the Commission shall cause a copy of its report in respect thereto to be delivered to the carrier, with a notice to such carrier to cease and desist from such violation, or to make reparation for the injury found to be done, or both, within a reasonable time to be specified by the Commission.

Section twenty gives the Commission power to require carriers to render annual reports to the Commission, to prescribe what these reports shall contain, and the method of keeping accounts.

ENFORCEMENT OF THE ACT. PENALTIES FOR VIOLATION.

In case of disobedience of the order of the Commission by any carrier when the controversy does not require a trial by jury, the Commission has power to apply in a

summary way by petition to the Circuit Court of the United States sitting in equity in the judicial district in which the carrier complained of has its principal office, or in which the action complained of shall happen, alleging such violation or disobedience; and the court shall have power to hear and determine the matter. On such hearing the findings of the Commission shall be *prima facie* evidence of the facts therein stated; and if the court shall find that the lawful order or requirement of the Commission has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other process, mandatory or otherwise, to restrain the carrier from further continuing such violation or disobedience of such writ of injunction or other proper process against such common carrier; and if a corporation, against one or more of the directors, officers or agents of the same; and the court may, if it shall think proper, make an order directing such common carrier or other person so disobeying the writ of injunction, to pay such sum of money, not exceeding for each carrier or person in default, $500 for every day after a day to be named in the order, that such carrier shall fail to obey such injunction. When the subject of dispute shall be of the value of $2,000 or more, either party may appeal to the Supreme Court of the United States, but such appeal shall not operate to stay or supersede orders or writs issued by the court.

When trial by jury is necessary, any company or person interested in such order or requirement of the Commission can apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, alleging such violation or disobedience, as the case may be; and the court shall order a trial of said cause, the findings of fact of the Commis-

sion to be *prima facie* evidence of the matters therein stated.

A new section, added March 2, 1889, provides:

The Circuit and District Courts of the United States, upon the relation of any person or persons, firm or corporation, alleging such violation by a common carrier of any provisions of the Act as prevents the relator from having interstate traffic moved by such common carrier at the same rates as charged, or upon terms or conditions as favorable as those given by the carrier to any other shipper under similar conditions, shall have jurisdiction to issue a writ or writs of mandamus commanding such carrier to move the traffic or furnish cars or other facilities for transportation for the party applying for the writ. Such peremptory mandamus may issue notwithstanding that proper compensation of the carrier may be undetermined.

An Act approved February 11, 1893, provides that no person shall be excused from attending and testifying, or from producing books, documents, etc., before the Commission, or in obedience to the subpœna of the Commission, on the ground that the testimony or evidence may tend to criminate him or subject him to a penalty or forfeiture. And any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce any books, papers, documents, etc., if in his power to do so, shall be guilty of an offense; and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $100, nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Section eight of the Act to Regulate Commerce makes the carriers liable for damages sustained in consequence of any violations of its provisions, to be paid to the persons injured, together with a counsel fee.

Section nine gives persons claiming to be damaged the right to elect whether to complain to the Commission or to bring suit in United States Court; and the officers, directors, etc., of the carrier may be compelled to testify.

Section ten provides that any common carrier violating the Act, or any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation, shall, upon conviction, be subject to a fine of not to exceed $5,000 for each offence; and in case such violation shall be an unlawful discrimination in rates, fares or charges for the transportation of passengers or property, such person shall, in addition to such $5,000 fine, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. And any common carrier, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, or false report of weight, or by any other device or means, shall assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then in force, shall be guilty of a misdemeanor, and shall, upon conviction, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term not exceeding two years, or both, in the discretion of the court.

The Expedition Act.

An Act approved February 11, 1903. The first section provides that in any suit in equity pending or hereafter brought in any Circuit Court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, "An Act to regulate commerce, ap-

proved February 4, 1887, or any other acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day.

The second section provides that in every suit in equity pending or hereafter brought in any Circuit Court of the United States under any of said acts, wherein the United States is complainant, including cases submitted, but not yet decided, an appeal from the final decree of the Circuit Court will lie only to the Supreme Court, and must be taken within sixty days from the entry thereof.

THE SAFETY APPLIANCES ACTS.

An Act requiring common carriers engaged in interstate commerce to make full reports of all accidents to the Interstate Commerce Commission.

This Act, approved March 3, 1901, provides that it shall be the duty of the general manager, superintendent, or other proper officer of every common carrier engaged in interstate commerce by railroad, to make to the Interstate Commerce Commission a monthly report, under oath, of all collisions of trains, or where any train or part of a train accidentally leaves the track, and of all accidents which may occur to its passengers, or employees while in the service of such common carrier and actually on duty, which report shall state the nature and causes thereof, and the circumstances connected therewith.

Section 2 makes failure to make such report within thirty days after the end of any month a misdemeanor,

and prescribes a penalty of not more than one hundred dollars for each offence, and for every day during which it shall fail to make such report.

Section 4 provides that the Interstate Commerce Commission is authorized to prescribe for such common carriers, a method and form for making the reports.

An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes.

This Act was approved March 2, 1893, and amended April 1, 1896. It provides that from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped that the engineer on the locomotive can control its speed without requiring brakemen to use the common hand-brake.

Section 2 provides that on and after January 1, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car used in moving interstate commerce not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Section 3 authorizes common carriers to refuse cars from connecting lines or shippers, when not properly equipped in accordance with the first section of the Act.

Section 4 provides that from and after the first day of

July, 1895, it shall be unlawful for any railroad company to use any car in interstate traffic that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Section 5 authorizes the American Railway Association to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, and to fix maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. In the event of the failure of the association to determine such standard, it is made the duty of the Interstate Commerce Commission to do so before July 1, 1894; and after July 1, 1895, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.*

This Act was amended April 1, 1896, Section 6 providing a penalty of $100 for each and every violation of its provisions. It is made the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

Section 7 of the amended Act gives the Interstate Commerce Commission authority from time to time, upon full hearing and for good cause, to extend the period within which any common carrier shall comply with the provisions of the Act.

This Act was again amended March 2, 1903, so as to make it apply in the Territories and the District of Columbia, and to apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements of the acts re-

* Prescribed standard height of drawbars; Standard gauge roads, 34½ inches; narrow gauge roads, 26 inches; maximum variation between loaded and empty cars, 3 inches.

lating to train brakes, automatic couplers, grab irons and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, except those exempted by the provisions of Section 6 of the Act of March 2, 1893.

Section 2 of the amended Act provides that power or train brakes shall be on not less than fifty per cent. of cars in trains, and that the Commission may increase the minimum percentage of power or train brake cars to be used.

Section 3 provides that the provisions of the Act shall not take effect until September 1, 1903.

The Act to regulate commerce has been in effect about eighteen years. That in its practical operation it has conferred great benefits upon the people, as well as on the railroads, cannot be questioned. Some of the causes of complaint have been removed; other evils have at least been restricted. That the purposes of the Act have not been fully attained, is due in a measure to the difficulties inherent in the subject of railroad regulation by the Government, and to the fact that the rule of free competition has been embodied in the law.

It is manifestly impossible to cover by legislation, all the details of the various and varying conditions that have to be considered in the establishment of rates; hence such regulation can only be of a general character, and the co-operation of the railroads is absolutely necessary to the proper enforcement of the Act. Such co-operation can best be secured through organized bodies such as traffic associations.

The fifth section of the Act greatly weakened these

associations by depriving them of one of the most effective means of restricting unjust discrimination. This was well known at the time the Act was passed. The Select Committee, in its report, does not recommend that a division of traffic, improperly called pooling, be prohibited. It says:

"For these reasons the committee does not deem it prudent to recommend the prohibition of pooling, which has been urged by many shippers, or the legalization of pooling compacts, as has been suggested by many railroad officials and by others who have studied the question.

"The prohibition of pooling is asked only to prevent the evils incident to the operation of the system as it has been conducted, and to avert the political dangers apprehended from combinations of aggregate corporate power. Its legalization is asked because pooling has thus far failed to accomplish its purpose by reason of the impossibility of enforcing the compacts made. The ostensible object of pooling is in harmony with the spirit of regulative legislation, but it is admitted that it has failed to accomplish its avowed purpose.

"The effect of pooling under a wise system of regulation cannot, perhaps, be fairly judged by its operation in the past under entire freedom from legislative restrictions, nor can it be safely assumed that it would be subject to the same objections and give rise to the same complaints under legislative regulation, as it has under the conditions which have heretofore governed its operation.

"It is believed that the evils which have been complained of can be largely remedied under the method of regulation proposed in the bill herewith reported. If this should prove to be the case, the prohibition of pooling is unnecessary. If it should not, this defect in the system of regulation can readily be corrected by additional legislation.

"But, in any event, the evils to be attributed to pooling are not those which most need correction, and, if agreements between carriers should prove necessary to

the success of a system of established and public rates, it would seem wiser to permit such agreements, rather than by prohibiting them, to render the enforcement and maintenance of agreed rates impracticable. The majority of the committee are not disposed to endanger the success of the methods of regulation proposed for the prevention of unjust discrimination by recommending the prohibition of pooling, but prefer to leave that subject for investigation by a commission when the effects of the legislation herein suggested shall have been developed and made apparent."

The practical operation of the Act demonstrated the correctness of this conclusion, and efforts were made to amend the fifth section of the Act. In 1892, the Acting Chairman of the Commission addressed a letter to the officials of railroads, merchants, State railroad commissioners and others, as follows:

"INTERSTATE COMMERCE COMMISSION,

"WASHINGTON, November 10, 1892.

"DEAR SIR:

"Will you kindly address a communication to the Interstate Commerce Commission, giving your opinion as to whether it is practicable, and if so, advisable, to amend the fifth section of the act to regulate commerce so as to legalize such contracts between competing roads as would tend to diminish unlawful discrimination and preferences in rates, and to maintain lawfully authorized reasonable rates; and stating the form of amendment that you think will best accomplish such result. Your paper will be confidential as to its source, if you desire; but we prefer to be at liberty to give it the authority of your name.

"A reply as early as practicable is desired."

Of the 54 answers published by the Commission, 47 were in favor of amendment of the section. The majority included the railway commissions of ten States, several

commercial organizations, and Hon. Charles Francis Adams. These letters are of great interest, as showing that the fifth section had operated to defeat the purpose for which the Act was passed. The following was one of the letters:

"KNOXVILLE, Tennessee, Novr. 26, 1892.

"Hon. W. G. VEAZEY, Acting Chairman
"Interstate Commerce Commission,
"Washington, D. C.

"DEAR SIR:

"I have the honor to acknowledge the receipt of your communication of the 1st inst., in which you request me to give you my opinion as to whether it is practicable, and if so, advisable, to amend the 5th Section of the Act to Regulate Commerce, so as to legalize such contracts between competing roads, as would tend to diminish unlawful discrimination and preference in rates, and to maintain lawfully authorized reasonable rates, and to state the form of amendment that I think will best accomplish such results.

I beg to submit the following:

FIRST.—The unjust discriminations in rates which are prohibited by the act to regulate commerce are the inevitable result of unrestrained competition.

SECOND.—Congress, in passing the act to regulate commerce, had two objects in view,—the desire to give the people all the benefits of free, unrestrained competition between carriers, and at the same time protect them from the evils which necessarily result from such competition. It is obvious that these objects are inconsistent. One must defeat the other. This inconsistency must always prove fatal to a proper enforcement of the act to regulate commerce.

THIRD.—In order to prevent unjust discrimination in rates, it is necessary to restrain and regulate competition. The Government alone cannot regulate competition. It must have the co-operation of the railroads, and

such co-operation can be made most effective by means of associations of transportation lines, formed for the purpose of establishing and maintaining reasonable rates, and of enforcing proper rules for the conduct of competitive business.

FOURTH.—Experience has shown that no matter how perfect the organizations of such railroad associations may be, and no matter how earnestly its members may desire to carry out in good faith, the provisions of the contracts, the object of such associations; that is, the strict maintenance of rates on competitive traffic, can never be attained so long as the railroads are not allowed to divide competitive traffic, and to pay in money any balances that may become due to the weaker lines.

FIFTH.—The fifth section of the act to regulate commerce prohibits such division of traffic, improperly called pooling, and deprives the railroads of the only means in their power to prevent unjust discrimination in rates. The fifth section thus defeats the very object of the act to regulate commerce.

In view of the above propositions, which experience has rendered self-evident, I do not hesitate to express the opinion that in order to carry out the provisions of the Interstate Commerce Act, it is not only advisable, but absolutely necessary, to amend said act so as to permit such contracts between competing lines as would tend to regulate competition by means of a division of traffic, and such reasonable rules and regulations as will best serve the purpose of diminishing unlawful discrimination and preference in rates, and maintaining lawfully authorized reasonable rates.

As to the form of amendment, I am of opinion that good results would be accomplished if the fifth section were eliminated from the act to regulate commerce. Such elimination appears to be entirely practicable.

Still better results would be accomplished by an amendment of the fifth section legalizing such contracts between competing lines, and providing for their enforce-

ment in the courts when approved by the Interstate Commerce Commission. While I am of opinion that such an amendment would be for the best interests of the people as well as of the railroads, I am not prepared to say that it is practicable, in view of the opinion so generally prevailing that such contracts are against public policy. The opinion is erroneous. It is based upon the fear that combinations between railroads would result in monopolies and extortionate rates. This fear is groundless because competition between the carriers themselves, competition with water lines, and competition between markets, must always prevent unjust and unreasonable charges for transportation, even if the Interstate Commerce Commission and the State Commissions did not protect the people against such charges.

"Yours very respectfully,

"HENRY FINK,

"Receiver East Tenn., Va. and Ga. Ry. Co., etc."

One of the defects of the Act to Regulate Commerce is to be found in the underlying idea that competition must be left without restraint. This idea is embodied in the fifth or anti-pooling section, which has impaired the efficiency of the Act. The prejudice against the division of traffic furnishes an illustration of the influence of a mere catchword upon the public mind. There is no analogy between the apportionment of business or of revenue between the railroads, and a combination of bettors in a race, a stake in a gambling game, or a speculation in stocks. Yet the word "pool" proved to be a death sentence to one of the most useful methods of rate regulation, a method to which no objection can be made. For it is well known that divisions of business have in no case put an end to competition, nor have they resulted in unreasonable rates. On the contrary, rates steadily and materially decreased while pooling was permitted. So long as the public enjoys just, reasonable and indis-

criminatory rates, it can have no interest whatever in the division of traffic, or of revenue between competing railroads; and it is immaterial to it whether such division is the result of free competition, or whether it is made by agreement. There must, necessarily, be *some* division; and the interesting fact was brought to light at the time the rate-wars between the Trunk Lines were of frequent occurrence, that the proportion of traffic which each competitor obtained was practically the same during such wars, as when there was peace, and rates were fairly well maintained. This shows that these proportions are dependent in a great measure upon the respective facilities that competitors can offer to the public.

Efforts to amend the fifth or anti-pooling section of the Act proved unsuccessful. The House of Representatives, Fifty-third Congress, Third Session, passed, December 11, 1894, an Act to amend an act to Regulate Commerce, and which provided that under certain conditions it should be lawful for common carriers to enter into agreements enforceable between the parties thereto—the conditions being that the contracts should be subject to approval by the Interstate Commerce Commission, which was to observe the workings and effects of such contracts as have become operative; and if the Commission found that rates and charges were excessive or unreasonable, or resulted in any unjust discrimination, it should issue an order requiring such rates, etc., to be modified or corrected; or the Commission might, if it should deem necessary, make an order disapproving the contract, in which case it should become illegal. This Bill failed to pass the Senate.

Bills embodying substantially the same provisions were introduced by Mr. Patterson in the House, January

13, 1896 (Fifty-fourth Congress, First Session), and by Mr. Foraker in the Senate, March 30, 1897 (Fifty-fifth Congress, First Session), by Mr. Harris of Kansas in the Senate, May 11, 1897), (Fifty-fifth Congress, First Session); and by Mr. Cullom by request, May 25, 1897. All these bills provided for permission to make contracts under certain conditions.

No further action seems to have been proposed to amend the fifth section of the Act, until Senator Elkins, during the First Session of the Fifty-seventh Congress, introduced his first bill, one section of which contained a pooling clause, which, however, the Senate Committee on Interstate Commerce refused to report. The clause was therefore eliminated; and the other section, with some modifications, was passed, and is now known as the Elkins Act. It was found that no legislation permitting a division of traffic, or so-called pooling, could be enacted, because the same popular apprehension that such agreements between railroads might result in monopolies, and which had compelled Congress to put the section into the Act, continued to prevail.

Another serious defect, and which prevented its efficient enforcement, has been found to be the fact that it is impossible for the Commission, however able and industrious its members have proved to be, to discharge the various duties of the office. They were required to see that all the provisions of the Act are carried out, that tariffs filed and published are adhered to; and they must act as detectives and discover any violations of the law. They are required to investigate the numerous complaints that come before them, and also such as they institute themselves, and determine judicially whether or not the law has been violated; and if so, they must act as prosecutors and see that the offending parties are punished.

In addition to these duties, and others that might be

mentioned, the supplementary acts require them to see that the railroads equip their cars with automatic couplers, and an adequate proportion of their engines and cars with air-brakes. They must require monthly accident reports, and endeavor to ascertain the causes of these accidents.

It cannot be questioned that the Commission has endeavored to conscientiously and faithfully perform the duties assigned to it; but the burdens imposed upon the Commissioners largely exceed the power of five men, no matter how great their ability and industry may be.

THE ELKINS ACT.

During the Fifty-fifth and Fifty-sixth Sessions of Congress, several bills were introduced, having for their object the strengthening of the Act to Regulate Commerce, so as to insure a more prompt and efficient enforcement of the law. As none of the proposed amendments were adopted, it is not necessary to examine their provisions here.

One of the most important laws regulating railroad rates was enacted by the Fifty-seventh Congress. It is the Elkins Act, approved February 19, 1903. It deals in a thorough and practical manner with unjust discriminations caused by the non-observance of tariffs published and filed with the Commission. The effect of this law has already been beneficent; and it is safe to say that its enforcement will ultimately abate the evil of unjust discrimination, so far as it is practicable for Government regulation to do so.

The Act provides that anything done or omitted to be done in violation of the Act to Regulate Commerce, and of the Elkins Act, committed by any director or officer of a corporation, shall be held to be a misdemeanor com-

mitted by such corporation, and upon conviction thereof shall be subject to like penalties prescribed by these Acts.

The failure to file tariffs and to strictly observe them, makes the offending corporation subject to a fine of not less than $1,000, nor more than $20,000, for each offence.

The same penalties are imposed upon corporations or persons who offer, grant, give or solicit, accept or receive any rebate for the transportation of any property which shall by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier.

The Act, however, abolished the penalty of imprisonment of such persons.

Under this Act, the rates filed with the Commission are conclusively deemed to be the legal rates; and any departure therefrom is deemed an offence under the Act (Section 1).

Section three provides that whenever the Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts, to the circuit court of the United States sitting in equity having jurisdiction; whereupon it shall be the duty of the court to inquire into the circumstances in such manner as the court shall direct, and to make such other persons or corporations parties thereto as the court may deem necessary; and upon being satisfied of the truth of the allegations of said petition, said court shall enforce an observance of the published tariff, or direct a discontinuance of such discrimination by proper orders, writs and processes, subject to the right of appeal as now provided by law.

This Act makes it the duty of the several district attorneys of the United States, whenever the Attorney-Gen-

eral shall direct, either of his own motion or upon request of the Commission, to institute and prosecute such proceedings; and the proceedings provided by the Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by the Act to Regulate Commerce and the Acts amendatory thereof. And the courts shall have power to compel the attendance of witnesses, who shall be required to answer on all subjects relating to the matter in controversy, and to compel the production of all books and papers both of the carrier and the shipper, which relate to such transaction; and the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying, or such corporation from producing its books and papers; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify, or produce documentary or other evidence in such proceeding.

THE SHERMAN ACT.

"An Act to protect trade and commerce against unlawful restraints and monopolies," and known as the Antitrust or Sherman Act, was approved July 2, 1890. It declares to be illegal, "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

It provides that every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not

exceeding one year, or by both said punishments, in the discretion of the court.

At the time of the passage of this Act, the opinion generally prevailed that it was designed by Congress to curb the bad commercial and industrial trusts that public opinion had condemned, and that it was not intended to apply to railroad corporations. This opinion seemed to be justified by the fact that only a few years previously, in 1887, Congress had passed the Act to Regulate Commerce, which applied solely to these corporations; and that the fifth section of that Act rendered it unlawful for any common carrier to enter into any contract, agreement or combination with any other common carrier for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads.

The decision of the Supreme Court of the United States of March 22, 1897, in the Trans-Missouri Freight Association case, came as a surprise, indeed as a shock, to the owners of railroads. Five of the judges of that court (the remaining four judges dissented) held in this case that "the Anti-trust Act applies to railroads, and renders illegal all agreements which are in restraint of trade or commerce." (The court below held that the Act did not apply to railroads.)

The agreement of the Joint Traffic Association having been drawn with the view of avoiding the objections to the contract of the Trans-Missouri Association, it was hoped that upon a further consideration of the Act, the Supreme Court might modify its opinion. The Joint Traffic Association case came to the Supreme Court on an appeal from the Circuit Court of the United States for the second circuit (Southern New York), which had held that the Sherman Act did not apply to railroads. But the Supreme Court reversed the decision of the Circuit

Court, by its decision of October 24, 1898, and again held that the Act applies to railroads. Five of the Supreme Court judges so held, three dissented, and one took no part in the decision.

When the traffic official undertakes to apply the provisions of the Act, as interpreted by the Supreme Court, to the practical conduct of his business, some very puzzling questions obtrude themselves upon his mind. He reads in the Act that "Every contract, combination in the form of trust or otherwise * * * in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal." He naturally desires to inform himself as to what constitutes restraint of trade; but he is unable to find in the Act a definition, which, to himself, seems applicable to railroad transportation. If there is any such definition in the decision of the Court in the Trans-Missouri Freight Association case, or the Joint Traffic Association case, he is unable to discover it. Ignorant of the principles of jurisdiction, he comes to the conclusion that the decisions in these cases rest upon the assumption that traffic associations are, and necessarily must be, in their operation, in restraint of trade or commerce. But he is unable to learn upon what facts or grounds this assumption is based. His own practical experience has taught him that the effect of these associations is to promote and facilitate commerce, by preventing, in a great measure, unjust discrimination, which necessarily obstructs commerce.

Upon further examination of these decisions he finds that his mind is unable to grasp the distinction between a reasonable rate of freight which has been made by agreement, and a reasonable rate which has not been made by agreement. The former is declared to be obstructive to commerce, and, therefore, illegal; and the other

not obnoxious to the law. He understands that a rate not made by agreement might be lower than one so made; but he does not see why the higher rate, if reasonable in itself, should operate to obstruct commerce. Rates lower than those which are reasonable may be considered as unreasonable in respect to the carrier, whose interests are to be considered in the adjustment of rates, as the U. S. Supreme Court has declared in its decision in *Texas and Pacific Railway Co. vs. Interstate Commerce Commission, 5 I. Com. Rep., pp. 405-437.*

But when the traffic official is told that, according to the decisions in these Association cases, it is immaterial whether the restraint is reasonable or unreasonable—that one is prohibited by law as well as the other,—he wonders why Congress has not changed the phraseology of a law that compels a construction which appears to himself so unreasonable, and, indeed, repugnant to common sense.

We have seen that the fifth section of the Act to Regulate Commerce greatly weakened the traffic associations, and prevented the efficient co-operation of the railroads in rate regulation. The decision of the court in the Joint Traffic Association case has impaired the usefulness of traffic associations to a degree that practically destroys them. If it is true that the Sherman Act was not designed to apply to railroads, then the destruction of these important associations, the result of twenty years of labor and experiments of the railroad managers, and which have conferred such great benefits upon the railroads and the people, was due to an accident,—probably the omission of a few words in framing the Act, or to phraseology that does not clearly express the intention of Congress.

We have here an illustration of the irony of fate, and the fact that slight causes often produce important results. The Act does not even permit traffic officers to

meet and agree upon uniform rates. This is declared to be a misdemeanor, and punishable by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both.

We have seen that the establishment of uniform rates is a necessity, if the transportation business is to be conducted in an orderly manner. It is said that "necessity knows no law:" but the traffic men do, and are bound to observe it. Necessity is said to be the mother of invention; but it is not to be expected that ingenuity of the highest order, when stimulated by necessity, can devise a method of establishing uniform rates without holding meetings of traffic officials,—which are prohibited by law! As telepathy, or some occult science, cannot be utilized in rate-making, it is manifest that the desired end can only be attained by restoring to the railroads the right of self-government: and this can only be done by legislation.

In the course of our inquiry into rate regulation by the Federal Government, we have seen that existing legislation has been largely influenced by the popular fear that railroad corporations might become great monopolies. Before entering upon the subject of additional legislation, it may serve a useful purpose to consider the question:

CAN RAILROAD CORPORATIONS BECOME MONOPOLISTIC TRUSTS?

So far, experience has shown that this fear is groundless. It can be demonstrated that, owing to the geographic situation of this country, and the operation of economic laws, these corporations can never acquire such a control of transportation systems as to enable them to exact unreasonable rates of transportation from the public.

CAN RAILROAD CORPORATIONS BECOME MONOPOLISTIC TRUSTS?

It is well known that the free highways of the ocean, the lakes, navigable streams and canals, are great regulators of railroad freight rates. I can give no better illustration than to quote from my monograph above referred to,—taking as an example, the section of country south of the Ohio and east of the Mississippi rivers:

"It will be seen from a glance at the map, that the Southern territory is exceptionally and favorably situated in respect to transportation facilities, and cheapness of transportation. About five-sixths of the territory is surrounded by navigable water, the Atlantic Ocean on the east, the Gulf on the south, the Mississippi on the west, and the Ohio River on the north. Navigable streams penetrate far into the interior of the country.

The Savannah River connects the Atlantic Ocean with Augusta, a city only 171 miles by rail from Atlanta, an important city situated near the center of the territory.

The Chattahoochee River, which empties into the Gulf, is navigable to Columbus, 127 miles from Atlanta by rail.

The Alabama River empties into the Gulf at Mobile, and connects Selma and Montgomery with the Gulf. The City of Montgomery, the capital of Alabama, is only 175 miles by rail from Atlanta.

The Coosa River, which empties into the Alabama River, is navigable to Rome, a city only 72 miles from Atlanta.

The Tombigbee River, which empties into the Alabama River, is navigable some distance above Demopolis, which is 275 miles from Atlanta.

One hundred and thirty-eight miles north of Atlanta, we strike, at Chattanooga, the Tennessee River, which has been made navigable to its mouth by the Government

at great expense. From Chattanooga, the Tennessee River is also navigable as far as Knoxville.

At the City of Nashville, 289 miles from Atlanta, we strike the Cumberland River, navigable all the way to the Ohio River.

A circle drawn with Atlanta at its center, with a radius equal to the distance by rail from Atlanta to Augusta, will strike all these navigable rivers except the Cumberland and Tombigbee Rivers.

Atlanta is distant 309 miles from Charleston by rail, and 294 miles from Savannah, 278 miles from Brunswick, and 354 miles from Mobile.

The following steamship companies have lines of steamers plying regularly between Northeast Atlantic and South Atlantic, and Gulf Cities:

Name of Steamship Company.	*Ports Between Which Its Steamers Ply.*
1. Merchants and Miners' Transportation Company.....	Boston, Norfolk, Washington and Baltimore.
2. Merchants and Miners' Transportation Company.....	Providence, Norfolk, West Point and Baltimore.
3. Merchants and Miners' Transportation Company.....	Savannah and Baltimore.
4. Clyde Steamship Company.....	New York and Charleston, and Jacksonville, Fla.
5. Clyde Steamship Company.....	New York and Wilmington and Georgetown.
6. Old Dominion S. S. Company.....	New York and Norfolk, Portsmouth and Newport News.

7. Old Dominion S. S. Company.....	New York and Richmond.
8. Old Dominion S. S. Company.....	New York and West Point, Va.
9. Ocean S. S. Company.....	Boston and Savannah.
10. Ocean S. S. Company.....	New York and Savannah.
11. Ocean S. S. Company.....	Philadelphia and Savannah.
12. Mallory Steamship Company.....	New York and Brunswick, and Brunswick and Fernandina.
13. Mallory Steamship Company.....	New York and Galveston.
14. Morgan Line Steamers	New York and New Orleans.
15. Cromwell Steamship Company.....	New York and New Orleans.
16. Balto., Ches. & Richmond S. S. Co.....	Baltimore and West Point.
17. Norfolk and Washington Steamboat Company.....	Washington and Norfolk.
18. Balto. Steam Packet Company.....	Baltimore, Norfolk and Portsmouth.

The following are the main rail lines connecting with these steamships at the Atlantic and Gulf Ports, and forming through lines between Northeastern Cities and the Southern territory:—

Name of Port.	*Railroads Connecting With Such Ports, and Forming Through Lines to the South.*
West Point, Va.....	Southern Railway (Piedmont Air Line).

CAN RAILROAD CORPORATIONS BECOME MONOPOLISTIC TRUSTS?

Norfolk, Va.....	1. Norfolk and Western Railroad, and Virginia, Tennessee and Georgia Air Line.
	2. Norfolk and Carolina Railroad (Atlantic Coast Line).
Portsmouth, Va.....	Seaboard and Roanoke Railroad (Seaboard Air Line).
Richmond, Va.....	1. Southern Railway (Piedmont Air Line).
	2. Atlantic Coast Line.
Wilmington, N. C.....	1. Cape Fear and Yadkin Valley Railroad.
	2. Carolina Central Railroad (Seaboard Air Line).
	3. Wilmington and Weldon Railroad (Atlantic Coast Line).
Georgetown, S. C.....	Georgetown and Western Railroad (Atlantic Coast Line).
Charleston, S. C.....	1. Atlantic Coast Line.
	2. South Carolina and Georgia Railroad.
Savannah, Ga.	1. Central Railroad of Georgia.
	2. Florida Central and Peninsular Railroad.
	3. Savannah, Florida and Western Railway.
Brunswick, Ga.	1. Southern Railway.
	2. Savannah, Florida and Western Railway.
Fernandina, Fla.....	Florida Central and Peninsular Railroad.
Jacksonville, Fla.....	1. Florida Central and Peninsular Railroad.
	2. Savannah, Florida and Western Railway.
	3. Jacksonville, Tampa and Key West Railway.

Mobile, Ala.....	1. Louisville and Nashville Railroad. 2. Mobile and Ohio Railroad. 3. Mobile and Birmingham Railway.
New Orleans, La.....	1. Louisville and Nashville Railroad. 2. Queen and Crescent System. 3. Illinois Central Railroad. 4. Yazoo and Mississippi Valley Railroad."

(Since 1894, when the above was written, several new railroads have been built in the South, and, with some of the older ones, annexed to the strong systems.)

"We have seen that nearly all the main lines, or systems, reach Atlanta from the seaboard, either with their own lines or by means of their connections. Atlanta may be considered as the railroad center of the Southern territory. The rates of freight from Eastern Seaboard Cities to Atlanta, necessarily have a controlling influence upon the rates in the entire Southern territory;—that is to say, they are the maximum rates that can be maintained to points of competition. The rates from New York to Chattanooga, Rome, Anniston, Birmingham, Selma and Montgomery, are the same as the rates from New York to Atlanta, and cannot be higher. North of Chattanooga the influence is felt of the low rates by the Eastern Trunk Lines to Cincinnati, Louisville, and Nashville, and competition by the Cumberland River. East and south of Atlanta, the rates have to be graded down until they reach the steamers' rates to the ports on the Atlantic.

Rates to the territory south of Montgomery, and Selma, are affected by the steamers' rates to the Gulf Ports, and the rates to the territory west, and northwest, of Selma, Birmingham, and Anniston, are affected by the low rates to Vicksburg, Memphis, and points in the Mississippi Valley.

It must be obvious that under these circumstances the

rates cannot be established on a percentage distance basis. Distance is not a controlling, nor even a very important factor, in the establishment of rates in the Southern territory.

The idea that rates in the Southern territory can be established, arbitrarily, by the transportation lines, or through the medium of the Southern Railway and Steamship Association, is erroneous. The fact is, that neither the lines separately, nor the Southern Railway and Steamship Association, have the power to make, or establish the rates from Eastern Seaboard Cities to Southern territory. They can only adjust them from time to time in accordance with conditions and circumstances over which they have no control.

The maximum rates from Northeastern Cities to Atlanta are made by reference to the rates of the Steamship Companies from such Northeastern Cities to Savannah, Ga., added to the rates established by the Railroad Commission of the State of Georgia from Savannah to Atlanta.

The former rates are unreasonably low by reason of the competition between the steamships and between the steamships and sailing vessels. The rates made by the Georgia Commission are, as might be expected, reasonably low; and the sum of the two rates; that is, the maximum rates that can be charged from Northeastern Cities to Atlanta, and the Southern territory, are unreasonably low."

Throughout the North and West, the Atlantic and Pacific Oceans, the Great Lakes, the Mississippi, Missouri and Ohio Rivers and their tributaries, and the artificial water-ways, are also great regulators of freight rates. And the Panama Canal, when completed, will exercise a potent influence on freight rates to and from the Pacific Coast.

The importance of cheap transportation between Chicago and New York by the Great Lakes and Erie Canal

and Hudson River, can hardly be over-estimated. About twenty years ago it was proposed to extend and strengthen the system of water transportation by the construction of additional canals connecting and shortening natural water routes. But practically little has been done in this direction,—probably because the railroads have furnished such excellent service at reasonable cost, that the large expenditures necessary to extend the waterways were deemed unnecessary.

In recent years the State of New York has determined to widen and deepen its Erie Canal; but it may be doubted whether the advantages that will accrue to the people from this work will be adequate compensation for the burden of additional taxation.

The influence of water transportation is not confined to the localities that are accessible by navigable streams, but is felt at places remote from points of direct competition with the railroads. This has been clearly shown by investigations of the Interstate Commerce Commission and of the courts, of cases that have arisen under the fourth, or long and short haul section, of the Act to Regulate Commerce.

Another important feature in the regulation of railroad rates is competition between markets. It is manifest that the railroads must always put the producers on the lines of their respective roads on an equality as to rates, as far as it may be practicable, with the producers in other sections of the country that ship to the same markets. And another factor in the regulation of freight rates, which is second only in importance to the influence of the water lines, is the enlightened self-interest of the owners of railroads. Experience has taught them a severe lesson,—that extortionate rates mean bankruptcy for their corporations. They know that in order to get a

fair return on the capital invested, they must establish rates with the view of developing the resources of the country, thus increasing the volume of the traffic. It is a question of large business and small profits. And this lesson has been heeded. As early as 1887, the investigation before the Senate Select Committee showed that there were few complaints of extortionate rates: and in recent years, we have had the testimony of the Chairman of the Interstate Commerce Commission that rates unreasonable *per se* were practically obsolete.

The enormous growth of the traffic of this country has compelled the railroad companies to enlarge their facilities, to provide additional tracks, to improve their roadbeds by reducing grades, and revising alignments, revisions that in many cases amounted to reconstruction; and to increase their equipment. This has necessitated enormous capital expenditures, and furnishes an additional reason why the owners of railroads cannot afford to charge extortionate rates, as such rates would kill their business, prevent the development of their traffic, and impair the earning powers of their roads. The thoughtful observer, after due consideration of these facts, must come to the conclusion that railway monopolies are not possible in this country, and that this would be true even in the absence of restrictive legislation.

The following table shows the mileage operated, the tons hauled one mile, and the average rate per ton per mile, on American railroads, from 1882 to 1903, both inclusive:

Railways of the United States.

Year.	Mileage Operated.	Tons Hauled.	Tons Hauled, One Mile.	Average rate per ton per mile.
1882.....	104,971	360,490,375	39,302,209,249	1.236 cts.
1883.....	110,414	400,453,439	44,064,923,445	1.236 "
1884.....	115,704	399,074,749	44,725,207,677	1.124 "
1885.....	123,320	437,040,099	49,151,894,469	1.057 "
1886.....	125,185	482,245,254	52,802,070,529	1.042 "
1887.....	137,028	552,074,752	61,561,069,996	1.034 "
1888.....	145,387	590,857,353	65,423,005,988	0.977 "
1889.....	157,758	539,639,583	68,727,223,146	.922 "
1900.....	163,597	636,541,617	76,207,047,298	.941 "
1891.....	168,402	675,608,323	81,073,784,121	.895 "
1892.....	171,563	706,555,471	88,241,050,225	.898 "
1893.....	176,461	745,119,482	93,588,111,833	.878 "
1894.....	178,708	638,186,553	80,335,104,702	.860 "
1895.....	180,657	696,761,177	85,227,515,891	.839 "
1896.....	182,776	765,891,385	95,328,360,278	.806 "
1897.....	184,428	741,705,946	95,139,022,225	.798 "
1898.....	186,396	879,006,307	114,077,576,305	.753 "
1899.....	189,294	959,763,583	123,667,257,153	.724 "
1900.....	193,343	1,101,680,238	141,599,157,270	.729 "
1901.....	197,237	1,089,226,440	147,077,136,040	.750 "
1902.....	202,471	1,200,315,787	157,289,370,053	.757 "
1903.....	207,977	1,304,394,323	173,221,278,993	.763 "

(The above figures, 1882 to 1888, inclusive, are from Poor's Manual for 1890. The figures, 1889 to 1903, inclusive, are from the annual Statistics of Railways in the United States, issued by the Interstate Commerce Commission.)

It will be seen that during the twenty-one years from 1882 to 1903, the mileage operated increased 103,006 miles, or over 98 per cent., and the tons hauled one mile increased 133,919,069,744, or over 340 per cent., and that the average rate per ton per mile decreased .473, or over 38 per cent.

It was during this period that many of the consolidations of railroads were effected.

The above figures speak more eloquently than any words could do, of the material development of this country during the last twenty-one years, the enormous growth of the traffic, due to the enterprise of the people and the efficient work of the railroads.

The following tables, compiled from the Interstate Commerce Commission's "Forty-Year Review of Changes in Freight Tariffs," show the great reductions that have been made in competitive rates.

FREIGHT RATES CHARGED FOR THE TRANSPORTATION OF CLASSIFIED TRAFFIC, VIA ALL-RAIL ROUTES, FROM NEW YORK TO CHICAGO FROM JANUARY 1, 1862, TO APRIL 1, 1902.

Date.		Classes (rates in cents per 100 pounds).						Date.		Classes (rates in cents per 100 pounds).					
		1	2	3	4	5	Special or 6.			1	2	3	4	5	Special or 6.
1862..	Jan. 1	160	128	107	66	..	.....	1871..	July 8	75	65	50	45	37	.....
	Oct. 9	180	150	125	75	..	.....		Sept. 1	30	30	30	30	24	.....
1863..	May 14	160	117	94	55	..	.....		Dec. 15	125	110	85	65	50	.....
	Nov. 23	180	150	124	85	..	.....	1872..	Aug. 1	75	70	60	45	35	.....
1864..	July 25	200	166	111	85	..	.....		Oct. 14	125	110	85	65	50	.....
	Sept. 20	215	180	120	96	..	.....	1873..	April 14	100	90	75	60	45	.....
1865..	May 8	215	180	106	96	..	.....		Aug. 13	27	27	18	18	17	.....
	Oct. 16	215	180	90	82	..	.....		Dec. 1	75	70	60	45	35	.....
1866..	Feb. 5	215	170	82	82	..	.....	1874..	Jan. 1	100	90	75	60	45	.....
	March 5	188	160	127	82	..	.....		Aug. 3	75	70	60	45	35	.....
1867..	Nov. 5	202	170	138	86	..	.....	1875..	Jan. 20	100	90	75	60	45	.....
1868..	June 4	188	160	127	82	..	.....		May 18	40	40	35	35	25	.....
	Oct. 1	70	60	55	50	..	.....		Dec. 22	30	25	20	20	15	.....
	Dec. 7	202	170	138	86	..	.....	1876..	Jan. 10	75	70	60	45	35	.....
1869..	Feb. 1	188	160	127	82	55	.....		July 28	15	15	15	10	10	.....
	Feb. 7	45	45	45	45	45	.....		Dec. 18	50	45	40	30	25	.....
	Aug. 11	25	25	25	25	25	.....	1877..	March 12	75	70	60	45	45	.....
	Sept. 24	35	35	35	35	35	.....		Dec. 10	100	80	60	45	..	.....
	Oct. 4	50	50	50	50	50	.....	1878..	Feb. 15	75	60	50	40	..	.....
	Oct. 9	75	75	75	75	50	.....	1881..	Aug 6	45	32	26	19	..	.....
	Nov 29	150	130	100	80	55	.....		Nov. 14	60	50	40	28	..	.....
1870..	April 14	140	125	100	80	50	.....	1882..	Jan. 24	45	32	26	19	..	.....
	July 13	80	70	60	50	35	42		Nov. 1	75	60	45	35	..	.....
	Aug. 12	50	50	50	50	40	.....	1885..	Jan. 26	50	40	30	25	18	.....
	Nov. 28	160	130	100	65	50	.....		Nov. 18	75	60	45	35	..	25
1871..	Feb. 20	150	130	100	70	55	.....	1888..	Jan. 9	75	65	50	38½	33	27½
	May 18	75	65	50	45	37	.....		Nov. 12	50	40	35	30	25	20
									Dec. 17 to April 1, 1902	75	65	50	35	30	25

RATES IN CENTS PER 100 POUNDS UPON GRAIN, ALL RAIL, FROM CHICAGO, ILL., TO NEW YORK, N. Y., FROM MARCH 28, 1864, TO APRIL 1, 1902.

Date.		Rate.	Date.		Rate.	Date.		Rate.	Date.		Rate.
1864..	Mar. 28	100	1870.	Jan. 22	55	1878.	Mar. 11	30	1885.	Mar. 10	20
	Apr. 14	75		Mar. 22	45		May 17	20		Nov. 23	25
	July 28	80		May 23	40		Nov. 25	35			
	Nov. 12	100		Nov. 22	60				1886.	Dec. 20	30
	Dec. 24	160				1879.	Mar. 24	20			
			1871.	Mar. 4	50		June 9	15	1887.	Mar. 23	25
1865..	Apr. 22	100		July 10	45		Aug. 25	30			
	May 5	70		Oct. 25	65				1888.	Jan. 8	27½
	Sept. 6	62½								Oct. 10	20
	Oct. 27	105	1872.	Mar. 25	60	1880.	Mar. 1	35		Dec. 15	25
	Nov. 9	130		Aug. 26	45		Apr. 14	30			
				Oct. 14	65				1889.	July 13	20
1866..	Jan. 9	80									
	June 7	60	1873.	Apr. 14	16	1881.	Apr. 1	30	1890.	May 12	22
	Oct. 10	90		Dec. 8	60		June 8	25		Dec. 29	25
	Nov. 5	105					Nov. 1	20			
			1874.	Apr. 15	40		Dec. 9	12½–20	1892.	May 9	20
1867..	Feb. 7	80		May 6	45					Oct. 10	25
	Apr. 15	50				1882.	Mar. 13	25			
	June 8	75	1875.	Oct. 1	30		Dec. 1	30	1893.	Dec. 7	20
	Sept. 23	85		Dec. 1	45					Dec. 25	15
						1883	Apr. 19	25			
1868..	Sept. 1	60	1876.	Mar. 7	40		Nov. 26	30	1894.	Jan. 1	25
	Dec. 7	75		May 5	20					Feb. 27	20
						1884.	Jan. 5	20		Nov. 12	25
			1877.	Jan. 2	35		Mar. 21	15			
1869..	Jan. 25	70		Oct. 17	40		July 21	25	1895.	Feb. 4	20
	Mar. 11	50								July 8	20
									1896.	July 15	15
										Oct. 31	20

Date.		Rate.			Date.		Rate.		
		Flour.	Wheat.	Corn.			Flour.	Wheat.	Corn.
1897..	Jan. 20	20	20	15	1900..	Mar. 5	15	15	15
	Oct. 15	22½	22½	22½		Nov. 1 (Export)	17½	16	16
1898..	Jan. 1	20	20	17½	1901..	June 1	15	15	15
	June 27	18	18	17½		June 1 (Export)	15	13½	13½
						Oct. 21 "	17½	16	16½
1899..	Feb. 1	20	17½	17½	1902..	Mar. 17 (Export)	15	16	16
	Apl. 7 (Export)	20	12	12		" 29 "	15	13	13
	Sep. 18	17	20	18		Apr. 14 "	17½	16	16
1899..	Sept. 18 (Export)	17	14	14					
	Nov. 1 "	22	20	20					

Freight Rates per Ton of 2,240 Pounds Charged for the Transportation of Anthracite Coal from Collieries on the Lehigh Valley Railroad in the Lehigh, Mahanoy, and Wyoming Regions to Perth Amboy, from June 7, 1875, to April 1, 1902.

Date.	Per Ton, 2,240 Pounds.						Date.	Per Ton, 2,240 Pounds.					
	From Lehigh and Mahanoy Regions.			From Wyoming Region.				From Lehigh and Mahanoy Regions.			From Wyoming Region.		
	Prepared Sizes.	Pea and Buckwheat.	Culm.	Prepared Sizes.	Pea and Buckwheat.	Culm.		Prepared Sizes.	Pea and Buckwheat.	Culm.	Prepared Sizes.	Pea and Buckwheat.	Culm.
	$	$	$	$	$	$		$	$	$	$	$	$
1875 June 7	2.56	....	....	2.86	....	....	1882 May 29	1.75	....	....	1.96	....	....
July 1	2.54	....	....	1.84	....	....	July 10	1.90	....	....	2.11	....	....
Oct. 1	2.60	....	....	2.90	....	....							
1876 Feb. 1	2.41	....	....	2.71	....	....	1884 April 1	1.77	1.57	1.57	1.86	1.66	1.66
Sept. 1	1.59	....	....	1.89	....	....	1885 Feb. 2	1.57	1.37	1.37	1.66	1.46	1.46
Nov. 1	1.62	....	....	1.92	....	....	Aug. 27	1.37	1.17	1.17	1.46	1.26	1.26
1877 April 1	1.36	....	....	1.57	....	....	1886 Oct. 1	1.47	1.27	1.27	1.56	1.36	1.36
Oct. 29	1.49	....	....	1.70	....	....	1887 April 4	1.56	1.41	1.41	1.67	1.52	1.52
							Nov 21	1.81	1.66	1.66	1.92	1.77	1.77
1878 Feb. 1	1.62	....	....	1.83	....	....	Dec. 12	1.90	1.75	1.75	2.00	1.85	1.85
June 26	1.75	....	....	1.96	....	....	1888 March 12	1.70	1.55	1.55	1.80	1.65	1.65
							May 1	1.70	1.40	1.20	1.80	1.50	1.30
1879 Jan. 13	1.62	....	....	1.83	....	....	1889 April 15	1.70	1.40	1.20	1.75	1.45	1.25
March 19	1.25	....	....	1.46	....	....	1892 Sept. 12	1.85	1.55	1.35	1.85	1.55	1.35
April 14	1.00	....	....	1.21	....	....	1893 Jan. 9	1.70	1.40	1.20	1.75	1.45	1.25
Nov. 1	1.15	....	....	1.36	....	....							
Nov. 24	1.40	....	....	1.61	....	....	1894 May 10	1.50	1.40	1.35	1.50	1.40	1.35
							1896 Sept. 7	1.55	1.40	1.20	1.55	1.40	1.20
1880 Jan. 4	1.40	....	....	1.61	....	....							
April 5	1.75	....	....	1.96	....	....	1901 { Apr. 1 to Apr. 1, 1902. }	1.55	1.40	1.25	1.55	1.40	1.25
Sept. 13	1.90	....	....	2.11	....	....							

REDUCTION IN RATES.

FREIGHT RATES, PER TON OF 2,240 POUNDS, CHARGED FOR THE TRANSPORTATION OF ANTHRACITE COAL FROM COLLIERIES ON THE LEHIGH VALLEY RAILROAD, IN THE WYOMING AND LEHIGH REGIONS, TO BUFFALO, N. Y., FROM AUGUST 1, 1875, TO APRIL 1, 1902.

Date.		From Wyoming Region.		From Lehigh Region		Date.		From Wyoming Region.		From Lehigh Region.	
		Coal Cars.	Box Cars.	Coal Cars.	Box Cars.			Coal Cars.	Box Cars.	Coal Cars.	Box Cars.
1875..	Aug. 1	$4.09	.....	.....	.....	1885..	Mar. 1	$2.35	$2.15	$2.74	$2.62
	Sept. 1	4.12	.....	.....	.....		Nov. 2	2.50	2.30	2.97	2.77
1876..	June 1	3.72	.....	.....	.....	1886..	May 1	2.20	2.00	2.57	2.47
	Sept. 1	2.83	.....	.....	.....		Nov. 15	2.30	2.15	2.72	2.62
	Oct. 27	3.22	.....	.....	.....	1887..	Apr. 21	2.00	2.00	2.32	2.32
1877..	Mar. 1	2.61	.....	.....	.....		Nov. 7	2.25	2.25	2.25	2.25
	Aug. 20	3.41	.....	.....	.....	1888..	Apr. 16	2.00	2.00	2.00	2.00
	Oct. 22	2.74	.....	.....	.....		Sept. 1	2.25	2.25	2.25	2.25
1878..	Feb. 1	2.90	.....	.....	.....	1889..	Apr. 15	2.00	2.00	2.00	2.00
	May 1	2.53	.....	.....	.....	1892..	May 2	2.25	2.25	2.25	2.25
1879..	Apr. 1	2.00	$1.85	.....	.....		Sept. 19	2.50	2.50	2.70	2.70
	Dec. 1	2.58	2.38	.....	.....	1894..	Apr. 2	2.00	2.00	2.00	2.00
1880..	Apr. 1	2.77	2.47	.....	.....	1895..	Aug. 5	1.75	1.75	1.75	1.75
	Dec. 1	3 12	2.82	.....	$3.29		Nov. 15	2.00	2.00	2.00	2.00
1881..	Jan. 1	3.26	2.96	.....	3.58	1896..	Sept. 7	2.25	2.25	2.25	2.25
	Apr. 25	2.93	2.63	.....	3.25	1899..	May 8	2.00	2.00	2.00	2.00
1882..	Apr. 17	2.84	2.54	.....	2.96	1900..	Jan. 1	2.25	2.25	2.25	2.25
	Nov. 1	3.11	2.81	$3.68	3.38		Mar. 14	2.00	2.00	2.00	2.00
1883..	Apr. 23	2.74	2.44	3.06	2.76	1901..	Apr. 6 to Apr. 1, 1902.	2.00	2.00	2.00	2.00
	Sept. 1	2.93	2.63	3.25	2.95						
1884..	May 1	2.62	2.32	2.94	2.64						
	Aug. 1	2.71	2.41	3.03	2.73						

AVERAGE FREIGHT RATES CHARGED DURING EACH YEAR FROM 1873 FOR THE TRANSPORTATION OF BITUMINOUS COAL FROM COLLIERIES IN THE CLEARFIELD REGION, ON THE PENNSYLVANIA RAILROAD, TO JERSEY CITY, N. J., PHILADELPHIA, PA., AND BALTIMORE, MD.

Year.	Jersey City.	Philadelphia.	Baltimore.	Year.	Jersey City.	Philadelphia.	Baltimore.	Year.	Jersey City.	Philadelphia.	Baltimore
1873..	$4.05	$3.55	$3.55	1883..	$3.33	$2.50	$2.50	1893.....	$2.25	$2.00	$2.00
1874..	4.05	3.55	3.55	1884..	2.93	2.20	2.20	1894.....	2.25	2.00	2.00
1875..	3.80	3.55	3.55	1885..	2.45	2.00	2.00	1895.....	2.25	2.00	2.00
1876..	3.55	3.55	3.55	1886..	2.45	2.00	2.00	1896.....	2.25	2.00	2.00
1877..	3.55	3.25	3.25	1887..	2.25	2.10	2.10	1897.....	1.78	1.57	1.57
1878..	3.55	3.25	3.25	1888..	2.25	2.10	2.10	1898.....	1.70	1.50	1.50
1879..	3.55	2.50	2.50	1889..	2.25	2.00	2.00	1899.....	1.44	1.19	1.19
1880..	3.75	2.50	2.50	1890..	2.25	2.00	2.00	1900.....	1.61	1.36	1.36
1881..	3.33	2.50	2.50	1891..	2.25	2.00	2.00	1901to Apr. 1, 1902.....	1.70	1.45	1.45
1882..	3.33	2.50	2.50	1892..	2.25	2.00	2.00				

Freight Rates Charged for the Transportation of Classified Traffic and Important Commodities via All-Rail, from Cincinnati, Ohio, to Atlanta, Ga., from September 19, 1879, to April 1, 1902.

Date.		Classes and Commodities.													
		Rates in Cents per 100 Pounds.												Rates in Cents per Barrel.	
		1	2	3	4	5	6	Bagging and cotton ties.	Lard, meats, bacon, pork, and packed and loose meats (car loads).	Flour in sacks.	Grain.	Ale and beer, in wood.	Whisky in wood.	Flour in barrels.	Beef and pork in barrels.
1879..	Sept. 19	130	112	94	76	63	49	46	50	51	46	55	76	92	170
1880..	Apr. 8	110	95	80	64	53	40	37	47	43	38	54	65	77	180
	Sept. 1	119	104	89	76	61	46	28	47	43	38	52	71	81	130
1881..	Sept. 1	95	85	75	65	55	45	34	38	34	31	52	61	66	115
	Nov. 25	95	85	75	65	55	45	34	43	39	36	57	66	76	131
1882..	July 10	95	85	75	65	55	45	28	34	31	28	48	55	56	102
	Sept. 1	118	102	88	73	59	46	28	47	34	33	52	62	66	141
1885..	Feb. 18	107	92	81	68	56	46	28	36	31	27	48	53	54	86
1894..	June 9	38	32	23	24	20	16	16	.....	....	....	....	....	....	....
	Aug. 1	107	92	81	68	56	46	22	35	28	24	36	53	48	35
1900..	Oct. 12	107	92	81	68	56	46	22	35	24	21	36	53	48	35
1901..	Jan. 1	107	92	81	68	56	46	22	35	24	24	36	53	48	35
1902..	Jan. 1 to Apr. 1.	107	92	81	68	56	46	28	35	24	24	36	53	48	35

FREIGHT RATES CHARGED FOR THE TRANSPORTATION OF CLASSIFIED TRAFFIC AND IMPORTANT COMMODITIES VIA ALL-RAIL, FROM CINCINNATI, OHIO, TO CHARLESTON, S. C., AND SAVANNAH, GA., FROM APRIL 1, 1879, TO APRIL 1, 1902.

Date.		Classes and Commodities.													
		Rates in Cents per 100 Pounds.												Rates in Cents per Barrel.	
		1	2	3	4	5	6	Bagging and cotton ties.	Lard, meats, bacon, pork and packed and loose meats (Car loads).	Flour in sacks.	Grain.	Ale and beer in wood.	Whisky in wood.	Flour in barrels.	Beef and pork in barrels.
1879..	Apr. 1	142	112	88	56	55	45	53	60	58	52	60	66	104	202
	Nov. 15	154	121	94	68	54	45	62	65	65	60	60	65	115	217
1880..	Sept. 1	146	110	88	74	60	51	45	47	43	43	61	....	81	157
	" 8	142	105	85	70	57	48	53	54	50	45	59	60	85	189
1881..	Apr. 15	146	110	88	74	60	51	53	50	40	40	64	69	75	173
	Nov. 25	112	93	78	66	53	44	38	38	35	35	58	62	69	124
1882..	Apr. 20	95	85	75	65	55	45	35	35	33	30	40	40	60	100
1883..	May 1	95	80	75	70	58	46	35	32	29	29	40	40	56	96
1885..	Feb. 17	95	80	75	70	58	46	35	32	29	25	40	40	50	77
1889..	Oct. 14	95	80	75	70	58	46	35	35	30	26	40	40	52	35
1894..	June 27	38	32	28	25	20	16	16	.....	....	....	....	....	.....	.....
	Aug. 1	95	80	75	70	58	46	35	35	27	23	30	40	46	35
1902..	Jan. 1 to Apr. 1	95	80	75	70	58	46	35	35	23	23	30	40	46	35

FREIGHT RATES CHARGED FOR THE TRANSPORTATION OF UNCOMPRESSED COTTON FROM MEMPHIS, TENN., TO NEW YORK, N. Y., AND BOSTON, MASS., VIA ALL-RAIL, FROM SEPTEMBER 1, 1880, TO APRIL 1, 1902.

Date.	Rates in Cents per 100 lbs. From Memphis, Tenn., to	
	New York, N. Y.	Boston, Mass.
1880 Sept. 1.....	74	79
1881 Apl. 20.....	68	73
Sept. 9	52	57
Dec. 12.....	57	62
1882 Apl. 8.....	47	52
Sept. 16....	72	77
1883 Dec. 27.....	62	67
1884 Jan. 17.....	55	60
Feb. 2.....	50	55
Apr. 5.....	nominal.	
Sept. 17....	62	67

Date.	Rates in Cents per 100 lbs. From Memphis, Tenn., to	
	New York, N. Y.	Boston, Mass.
1885 May 21.....	45	50
Sept. 25....	62	57
1886 Sept 18....	nominal.	
Oct. 1.....	53	58
1887 Sept. 29....	nominal.	
Nov. 4.....	50½	55½
1888 Feb. 27	45	50
1893 May 3.....	45½	50½
" 17.....	42	47
June 12....	39	44
Aug. 21....	50½	55½

Date.	Rates in Cents per 100 lbs. From Memphis, Tenn., to	
	New York, N. Y.	Boston, Mass.
1894 Oct. 18.....	50½	55½
1897 Nov. 27.....	47	52
1898 Mar. 15.....	44	49
Sept. 1.....	50½	55½
1899 Feb. 2.....	45½	50½
1901 Feb. 1 to Apr. 1, 1902	50½	55½

It is sometimes alleged by foreigners that the people of this country are disposed to speak in a somewhat boastful manner of the superiority of American institutions. However this may be, it is certain that it does not apply to the railroad systems. They receive scant praise and much abuse from the people: and yet it can be said without exaggeration, that these systems are the most splendid in the world, and that the American people may feel a just pride in them. It is interesting as well as gratifying to find that a foreign railroad expert, after a thorough examination of the American Railway system and methods, appreciates their work.

A FOREIGN EXPERT'S OPINION OF AMERICAN RAILWAYS.

The following are extracts from the report by Neville Priestley, Under Secretary to the Government of India, Railway Department, dated December 30, 1903:

"The present prosperity of the United States of America is to no small extent due to the low rates charged for transportation. This prosperity has reflected itself in an increase of wages all round, which in its turn has increased consumption and consequently production. These high wages are not due to the necessaries of life *costing* the laboring classes in America more than they cost the same class in England. It is only the *style* of living which is better. * * * The traffic officers are men whose sole business is the solicitation of traffic and the fixing of rates which will make that traffic move. They spend the whole of their time traveling about the country with this object, and all railways recognize that a rate which is good enough for the railway on which the traffic originates is good enough for them. * * * The force of traffic officers is strong and capable, and their attentions are not confined to America alone. They are in constant touch with shippers and they watch the foreign markets; and where changes in rates are necessary to secure business, they are not slow to make them in combination with the steamer companies or by themselves. It is through the agency of these traffic officers that markets are now being opened up for American products in China and Australia in competition with European markets, and I was told of more rates than one which had lately been introduced with this object. * * *

"In conclusion, I desire to express my thanks to the Government of India for the opportunity they afforded me for studying American railway methods. It was a most interesting and instructive experience. The railways of America are commercial undertakings on a gigantic scale, and are operated under conditions which are to be found nowhere else in the world, since they receive no protection from the State, and have had to fight their way to the front by sheer ability of management. If I have appeared enthusiastic at times, it is because I was greatly impressed by the courage with which the railroad

officers have faced their difficulties, and the pluck with which they have overcome them. It is impossible to associate with the great men who have made their mark on American railway, I may say American national, history, without being infected with some of the enthusiasm they show for their business; and no man can travel over their railways without becoming possessed of a great deal more knowledge than he previously had, or without getting many valuable hints. Many of their methods are different, often startlingly different, from those one has been brought up to believe the only correct method; and it is not till one realizes that the one idea in the mind of American railway men is to 'get there,' and that they do 'get there' by the shortest and quickest way, and do not allow themselves to be turned aside either by red tape, old-time prejudices, tradition, or any other of the bogeys by which older countries are assailed, that one understands how the results have been obtained which one sees there. American railway men are quick to see a new idea; they are quicker still to try it; they take a great pride in their profession, and are all striving to get at the science of it. That their methods are not always perfect is what might have been expected; but they have managed to do what no other country in the world has done; and, that is, to carry their goods traffic profitably at extraordinarily low rates notwithstanding the fact that they pay more for their labor than any other country. It is in the study of how they do this that much benefit can be derived by other countries; and if I have, in some degree, succeeded in throwing light on their methods, I shall feel that I have benefited others as well as myself by my visit to that great country where the courtesy of the people is only exceeded by their hospitality."

III.

ADDITIONAL LEGISLATION.

On March 30, 1896, the Supreme Court of the United States decided in *Cincinnati, New Orleans and Texas Pacific Railway Co. vs. Interstate Commerce Commission,* 162 U. S., 184 (also known as the James and Mayer Buggy

case), (and Social Circle case) that there are no provisions in the Act to Regulate Commerce that expressly or by implication confer upon the Interstate Commerce Commission the power to fix rates; and that the power vested in the Commission to pass upon the reasonableness of existing rates, does not imply authority to prescribe rates in advance.

In the cases of *Freight Bureau of the Cincinnati Chamber of Commerce* vs. *Cincinnati, New Orleans and Texas Pacific Railway Co., et al.,* and *Chicago Freight Bureau* vs. *Louisville, New Albany and Chicago Railway Co., et al.,* 167 U. S. Repts., 479 (known as the Maximum Rate Cases), the Supreme Court decided on May 24, 1897, that an inquiry whether rates of carriers are reasonable is a judicial act, but to prescribe rates for the future is a legislative act;—that Congress has not transferred to the Commission the power to prescribe a tariff of rates which shall control for the future.*

The decision in the Maximum Rate cases excited the apprehension of the Commission that its own usefulness would be impaired to a degree that must render the Act to Regulate Commerce of no value to the public. In a lengthy review of this decision and its effects, in its Eleventh Annual Report (1897), it takes a gloomy view of the past as well as the future operations of the Act. It says on page 37:—

"The enactment of the Act to Regulate Commerce was in obedience to a popular demand, and to remedy admitted evils. The experience of ten years has demonstrated the necessity and justice of such an act. Nearly every essential feature of that Act has failed of execution. There is to-day, and there can be under the law as now interpreted, no effective regulation of interstate carriers. If there is to be under this Act, it must be amended."

* The Hon. Edward Baxter, of Nashville, Tennessee, has for a number of years represented the Southern railroads as their special counsel in Interstate Commerce cases. His distinguished services in the Maximum Rate cases alone, not to mention his success in other important cases, would entitle him to the gratitude of the owners of American railroads. Judge Baxter's great ability as a lawyer, combined with a knowledge of the business of railway transportation, enables him to present clearly, fairly and forcibly, the complex questions of law and fact arising under the Act to Regulate Commerce.

AGITATION FOR THE ENLARGEMENT OF THE COMMISSION'S POWERS.

In referring to the remedy that, in view of the decision of the Supreme Court, a shipper who has paid an excessive rate has against the carrier, it says on page 21 of the Report:—

"One cardinal purpose of the Act to Regulate Commerce was to secure uniformity of rates; and presumably Congress intended to, and understood that it had, provided some means by which this intent could be made effectual; but the application of this remedy, which the Supreme Court says is the only one, produces, not uniformity and equality, but the direst confusion and the grossest discrimination."

On page 26, the Commission says:

"It is apparent, therefore, that practically all the cases which this Commission can be called upon to hear and formally determine in the future, will be those arising under either the first or third section. * * * We feel that the Commission should be given by additional legislation the power in these respects which it was supposed to have at the outset."

Most railway managers will dissent from the opinion of the Commissioner as to the results in the past, of the operation of the Act to Regulate Commerce. But assuming its correctness, the fact that nearly every essential feature of the Act has failed of execution during the ten years the Commission exercised the rate-making power, does not lend support to its claim that it ought to have that power; nor does it seem to justify its predictions of such disastrous effects in the future.

Happily, experience has demonstrated that the Commission was mistaken in its pessimistic views. There has been a steady and marked improvement in respect to compliance with the Act,—especially with the provision forbidding rates unreasonable *per se:* so that the Commis-

sion, in its Sixteenth Annual Report (1902) was enabled to report to Congress that notwithstanding the defects of the Act, it had not failed to bring about important reforms; that on the contrary, it had furnished a considerable restraint upon the carriers subject to its provisions, and had promoted in a substantial degree, the ends which it was designed to secure (See page 6 of Report for 1902). And Chairman Knapp of the Commission testified before a Congressional Committee that complaints of unreasonable rates are practically obsolete.

In subsequent reports to Congress, the Commission renewed its recommendations that the Act be amended, and that its powers be enlarged. It called attention to the effects of consolidations in suppressing competition between carriers that had been relied upon to secure reasonable rates, and pointed out the inadequacy of the law in dealing with the conditions created by the most far-reaching and powerful combinations. In its efforts to obtain additional legislation, the Commission secured the co-operation of certain commercial associations in the West, such as the Millers' Association and its successors. At a convention in Chicago in 1899, at the call of this Association, the representatives of national commercial organizations formally approved of a bill introduced in the Senate by Senator Cullom. This League of National Associations, and the Interstate Commerce Law Association which succeeded it, were formed for the purpose of creating sentiment in favor of legislation enlarging the powers of the Commission, this work being entrusted to an executive committee which made strenuous efforts to induce other associations to join, and to inform the public and members of Congress of their views on the subject of railway rate regulation.

In December, 1899, the Commission passed a resolution instructing as follows:—

AGITATION FOR THE ENLARGEMENT OF THE COMMISSION'S POWERS.

"Co-operation with certain mercantile organizations to secure the adoption of an amendment of the act to regulate commerce being under consideration, it was unanimously voted to instruct the secretary to co-operate with the representatives of these organizations for the purpose of securing the adoption of the necessary amendments, and particularly the passage of a bill which has been approved by such organizations at a meeting held in Chicago on November 22, 1899, and to that end to give the public information as to the present state of the law and the necessity of amending it by distributing such reports, papers, and documents, as are designed to accomplish that purpose, and to devote himself assiduously to such duties."

The Secretary of the Commission faithfully complied with these instructions. He sent out circular letters endorsing a bill conferring the rate-making power upon the Commission, and requested parties to use their influence with their Senators and Representatives to aid in securing its passage. This agitation resulted in the introduction (First session, Fifty-sixth Congress) of the Cullom Bill.

This bill provided for amendment of the Act to Regulate Commerce in accordance with recommendations of the Interstate Commerce Commission. Its main features were:—

1. The delegation to the Commission of the power to prescribe rates. This power to fix rates included power:

(a) To fix a maximum rate covering the entire cost of the service.

(b) To fix both a maximum and minimum differential in rates, when necessary to prevent discrimination.

(c) To determine the division between carriers, of a joint rate, and the terms and conditions under which business shall be interchanged, when that is necessary to an execution of the provisions of the Act.

(d) To make changes in classification.
(e) To amend the rules and regulations under which traffic moves, so as to bring them in conformity with the provisions of the Act.

These powers to be exercised by issuing so-called administrative orders, subject to an appeal to the Circuit Court, which may suspend the operation of the order pending the proceedings.

2. The bill requires the Commission to prescribe a uniform classification to be observed by all carriers subject to the Act. The most important feature of the bill, next to the delegation of the rate-making power, is the amendment of the fourth, or long and short haul clause, by striking out the words, "under substantially similar circumstances and conditions,"—making it an absolute, rigid mileage rule, and thus nullifying the rational construction placed on this section by the Supreme Court of the United States. The dispensing power of the Commission; that is, their authority, upon application of the carriers in special cases, to charge more for the shorter distance, is retained, thus giving the Commission power to adjust the relations of rates between localities,—a power, the exercise of which, Judge Cooley, in the First Annual Report of the Commission (1887), declared would be superhuman in a country so large as ours, with so vast a railroad mileage.

The Cullom Bill failed of passage.

In January, 1902, the Nelson-Corliss Bill was introduced, at the First Session of the Fifty-seventh Congress,—Mr. Corliss introducing it in the House, and Mr. Nelson in the Senate.

This bill amends the Act to Regulate Commerce so as to give power to the Commission, by means of so-called "definitive" orders, to determine, upon investigation, what rates, relation of rates, classification, or other practice

should be observed for the future,—these "definitive" orders to be subject to review by the Circuit Courts, which may suspend their operation during the pendency of the proceedings.

The bill also provided that upon petition of the Commissioners, the courts shall enjoin carriers from giving, and shippers from receiving, any concession or rebate, or drawback; and provides for penalties.

As we have seen, the first Elkins Bill was introduced at the First Session of the Fifty-seventh Congress. The pooling clause it contained was eliminated; and the remainder, with modifications, was passed and approved, February 19, 1903.

In December, 1903, at the Second Session of the Fifty-eighth Congress, the Quarles-Cooper bill was introduced.

This bill provided that any order made by the Commission declaring any existing rate or rates, or any regulation or practice affecting such rates, or facilities afforded in connection therewith, to be unjustly discriminative or unreasonable and declaring what rate or rates, regulation or practice would be just and reasonable and requiring them to be substituted therefor, should become operative within thirty days after notice, or in case of a proceeding for review, within sixty days after notice.

The bill also provided that the Commission shall have power over the divisions of joint rates, and to determine the just relation of rates to or from common points on the lines of the carriers, parties to the proceeding. It also provides for the enforcement of the orders of the Commission by writ of injunction, which shall be issued by any Circuit Court of the United States on petition of the Commission. The decisions of the Commission were made reviewable within twenty days from the service of the order, by any Circuit Court of the United States for any district through which any portion of the road of any

carrier named in such order shall run; and pending such review, the court may, upon application and hearing, suspend said order.

The Committees on Interstate and Foreign Commerce devoted considerable time to the consideration of these various bills, and took voluminous testimony of the representatives of the commercial organizations and the managers of railroads. No great interest seems to have been taken in the proceedings by the general public, until the President, in his message of December 6, 1904, declared that "in my judgment, the most important legislative act now needed is one to confer on the Interstate Commerce Commission the power to revise rates, the rates at once to go into effect."

This message gave a new impetus to the agitation for additional legislation; and the powerful influence of the President caused the passage, February 9, 1905, by a large majority of the House of Representatives, of the Esch-Townsend Bill, the representatives of both political parties, with few exceptions, voting for the measure.

As the President's message deals largely with the subject of unjust discriminations, and especially with the payment of rebates, it is necessary to a proper understanding of the question as to whether additional legislation is needful and practicable, and if so, whether the proposed measure is likely to attain this object, to inquire further into the subject of discriminations, before we consider the provisions of the Townsend Bill.

DISCRIMINATION AGAINST PERSONS, COMPANIES, FIRMS, CORPORATIONS.

Discrimination is the underlying principle of all railroad tariffs, whether they have been established by State railroad commissioners, or by the railroads themselves.

This is so necessarily. Were it otherwise, railroads could not be successfully operated. Instead of promoting and facilitating commerce, they would hamper and obstruct it, and cause great injury to the public.

It is important, however, to distinguish between discriminations that are just, which the law permits, and unjust discriminations, which it prohibits. With few exceptions, discriminations against persons in rates or facilities of transportation, are repugnant to man's natural sense of justice, and are prohibited under severe penalties. The exceptions in the Act to Regulate Commerce are, the carriage of property for the United States or State or municipal governments, or for fairs, expositions, and for charitable purposes.

The most despicable form of discrimination, and which aroused the hostility of the people against the railroad corporations, is the payment of rebates. It is one of the greatest evils that unrestrained competition has produced. This practice can be traced to the custom that prevailed largely in the early days of railroads, of granting special rates to shippers. Railroad managers supposed they had a right to conduct the commercial part of the business of their companies upon the same principles and by similar methods as are employed by merchants,—that they might sell transportation at any prices that were obtainable, provided the maximum prescribed by the charters of some of the corporations was not exceeded. This supposed right was recognized by customers, who claimed and obtained special reduced rates upon large shipments, upon the ground that they were wholesale transactions; while the shipper of small quantities had to pay regular tariff rates. This practice was general, a large portion of the traffic being handled by this method.

In fact, the rates on almost all larger shipments were made by bargains between the railroads and the shippers.

This practice continued after railroad officials had been made to understand that the statute law requires common carriers to treat all shippers alike under like circumstances. But they only changed their methods. Instead of making the special rates openly, they made secret contracts with shippers, and carried out their part of the bargains by paying rebates. With the great increase of competition, the practice of paying rebates also grew, and at one time assumed enormous proportions. The roads or lines that were unable to furnish facilities of transportation equal to those of the stronger lines, were compelled, in order to obtain a share of the competitive traffic, to offer their customers some inducement in the way of reduced rates. If this had been done openly, these roads would have derived no advantage from the reductions, because their stronger competitors would also have reduced their rates. The prohibition of rebating by the Act to Regulate Commerce furnished an additional and most potent inducement to secrecy. The pernicious practice has at all times been condemned by railroad managers. We have seen that, in 1875, at a convention of railroad men, the practice of rebating was denounced as a disreputable custom, as bribery and corruption, dishonest and unbecoming to railroad management, and demoralizing to railroad employees and their patrons.

The practice was condemned by railroad managers not only because it is illegal and wrong in itself, but also because of the general demoralization it produced in the traffic conditions of the country, and the enormous losses it caused to the railroad companies. Curses loud and deep have been heaped on the heads of traffic men who have made long-time contracts with shippers at cut rates during rate-wars, or in anticipation of such wars. These contracts always presented a serious obstacle to the restoration of rates, and prolonged the wars. We have seen

that railroad managers have made continuous and most strenuous efforts to abolish an evil so injurious to the interests of their companies, as well as to the interests of the public. They have welcomed legislation designed to correct this abuse, such as the Elkins Act.

But rebates are but symptoms of a disorder, and, so far, legislation has been directed to a removal of the symptoms. To be effectual it should strike the evil at its root,—which is "free competition."

DISCRIMINATION AGAINST LOCALITIES.

Discriminations which result from the diversity of circumstances and conditions that have controlling influence in the adjustment of rates, are not unjust. It is not within the power of man to equalize these conditions; and the establishment of uniformity, and absolute equality of rates, is not only impracticable, but undesirable.

The Act to Regulate Commerce does not prohibit such discriminations. It provides, however, that preferences shall not be "undue or unreasonable." The law does not define what constitutes unjust discrimination against localities; for, owing to the great diversity of conditions, no such definition can be made; and no general rule applicable to special cases can be established. Each case must be determined by itself, upon its own merits, in accordance with the surrounding circumstances and conditions.

At first sight it might appear that the fourth section of the Act to Regulate Commerce furnishes a rule for the determination of the question as to what constitutes unjust discrimination against localities. But this long and short haul rule is not absolute and inflexible. It is qualified by the words, "under substantially similar circumstances and conditions;" so that these conditions have to be inves-

tigated before any conclusion can be reached as to the justice or injustice of the discrimination.

Complaints of unjust discrimination against localities were very numerous in the early history of railroads. They arose soon after railroads were compelled to form continuous lines, and, by consolidations and traffic arrangements with connecting lines, to reach out for additional traffic, the volume of local traffic of the roads having proved insufficient for their support.

As stated in my monograph, "The Adjustment of Railway Freight Tariffs:"

"No action of the railroad companies in the United States has contributed so much to the creation of the unreasonable prejudices that have existed in the past, and which even now prevail to some extent, as the practice which is forced upon the railroad companies of charging the local shippers more per 100 pounds for carrying their freights over a road, than is charged at the same time to shippers at distant points for the transportation of through freights over the same road in the same direction and for the same distance, or even for a greater distance.

"Communities on the line of a railroad, who had taxed themselves for the purpose of aiding a company in constructing a railroad, naturally thought it an intolerable hardship that such corporation should discriminate in favor of shippers residing in other States who had no interest in the road, and who never contributed anything to its construction.

"The theory prevailed almost universally that railroad companies should charge each of their customers in proportion to the use they make of the road; that such use, or the cost and value of the service, can be measured by the distance the freight is carried over the road; and that, therefore, the freight rates should be in proportion to the distance an article is carried over a railroad, regardless of the point of origin and destination of such article, and regardless of all other considerations.

"Attempts were made to carry this theory into practical operation by legislation. It was proposed to enact

so-called 'equal mileage laws,' and also to prohibit under all circumstances, greater charges for shorter than for longer hauls. As might have been expected, these attempts had to be abandoned. It was found, upon investigation, that such regulation of railroad freight rates is impracticable; that the theory of equal mileage, which was doubtless derived from transportation over common country roads or turnpikes, cannot be applied to railroad transportation; and that the enforcement of such laws would result in irreparable injury to the public, as well as to the railroads. It is obvious that a railroad tariff that is constructed upon the equal mileage theory, and based upon a reasonable rate for the short haul, must make the rate for the long haul unreasonably high,—so high as to exclude the shipper from distant markets. If, on the other hand, such a tariff is based upon a reasonable rate for the long haul, so as to enable shippers to send their freights to distant markets, the rate for the short haul may be unreasonably and unnecessarily low. In fact, it may be made so low that the company would not be able to earn sufficient revenue to maintain and operate its road. * * *

"The railroad problem has numerous paradoxes. For instance, it is difficult for one who has not studied the question, to believe that any circumstances could exist which would justify a greater aggregate charge for a shorter than for a longer distance on the same article of freight, over the same road, and going in the same direction. No doubt it must appear absurd to persons who are not familiar with the conditions under which railroad tariffs have to be established. And yet the proposition is perfectly true in fact; and is recognized as true in every country in the world where railroads exist.

"Upon investigation it was found that the principle underlying the practice of charging more for the shorter than for the longer haul, *under certain circumstances and conditions*, is correct; that the practice does not necessarily result in *unjust* discrimination against localities; and that an absolute prohibition to charge more for a short than for a long haul would, under many circumstances, work great hardships to the public, as well as to

the railroads, by stifling competition, by depriving the country of the benefit of low through rates for long distance transportation, and by depriving the railroads of a large portion of the revenue they need to enable them to operate their roads.

"It was also found that the circumstances and conditions which will justify a greater charge for the shorter than for the longer haul, are by no means exceptional; that in certain sections of the country, and notably so in the Southern territory, these circumstances and conditions prevail generally. Congress in its wisdom did not adopt the Reagan bill, which proposed to prohibit, absolutely, a greater charge for a shorter than for a longer haul under any circumstances; on the contrary, the fourth section of the Act to Regulate Commerce expressly permits carriers, under certain circumstances and conditions, to charge more, in the aggregate, for the shorter, than for the longer haul."

Soon after the organization of the Commission in 1887, it exercised the dispensing power conferred upon it by the fourth section of the Act, upon the application of a large number of railroads, principally operating in the South, by granting them temporary relief. As these applications were based upon an erroneous interpretation of the fourth section by some of the railroad managers and their legal advisers, the necessity for the exercise of the dispensing power ceased when the correct interpretation of the fourth section prevailed.

In the earliest cases that came before the Commission, notably in the case of the *Southern Railway and Steamship Association*, 1 I. C. Rep., 278-291, the Commission held that the following circumstances and conditions justified the carriers in charging more for the short than for the long haul:—

1. Competition of controlling force in respect to traffic important in amount, with carriers by water that are not subject to the Act to Regulate Commerce: Provided,

however, that such competition is legitimate, and a greater charge for the short haul does not result in unjust discrimination,—such competition not being limited in force strictly to the points of contact of the water and rail lines, but extends its influence to an indefinite distance therefrom.

2. Competition of railroads subject to the Act to Regulate Commerce when such competition is legitimate, and the application of the inflexible short haul rule would be destructive of such competition.

3. In cases where the expenses of the carrier of the short haul traffic are exceptionally greater than on long haul traffic.

In its later decisions the Commission materially modified these opinions, holding that the conditions and circumstances created by competition between carriers subject to the Act did not justify a greater charge for the short than for the long haul. But the United States Supreme Court, upon appeal from the decision of the Commission, notably in the case of *Interstate Commerce Commission vs. Alabama Midland Railroad Co.*, 168 Sup. Court Rep., 169, held that:

"Competition between rival routes may lawfully be considered in making rates, and substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line."

Since the enactment of the Act to Regulate Commerce, a large number of railroads have modified their tariffs so as to conform, either strictly or more nearly, to the fourth section of the Act. The northern Trunk Lines had already adjusted their tariffs on a basis that did not involve discrimination against the short haul traffic. The rates between Chicago and New York, which are very low, being determined by competing water routes, were taken

as a basis of the tariffs; and a percentage table, based approximately upon the relative distance of their points to points of destination of the freight, gave the corresponding rate from other cities in the territory east of the Mississippi river and north of the Ohio river.

Complaints that local rates are higher in proportion than through rates, have become less numerous; and the frequent discussion of the subject has led the people to understand that such preferences are often justified by surrounding conditions, and are not undue and unreasonable. It is reasonable to expect that discriminations against the short haul traffic that prevail in the South and some parts of the West, will gradually diminish as the volume of the traffic and the earnings of the roads increase, and with the construction of additional railroads in those sections of the country.

The principal complaints of discrimination against localities now come from large business communities and trade centers which are also railroad centers; and these complaints will continue so long as commercial rivalry exists between such communities.

This is one of the alleged evils that can never be remedied either by legislation or by the railroads themselves. The competition is really between the rival communities; but the railroads naturally take sides with the communities they respectively serve, and do all in their power to place them in a position to compete upon the most advantageous terms. They have frequently engaged in costly rate-wars in order to gain some advantages for their constituents; and as these wars generally end in compromises or agreements by means of arbitration, the rates throughout the country may be regarded as being in a state of equilibrium,—an equilibrium, however, which is unstable;—it can easily be disturbed by the action of one or more of the competing carriers.

On this subject the Interstate Commerce Commission, in its Annual Report for 1904, said:—

"It is worth observing that some at least of the most important controversies involving the rates and methods of railway carriers are rather between competing communities or producing regions than between rival lines of railway. Railway development has extended far beyond the point at which any of the greater systems finds its interests so identified with a single community as to feel wholly indifferent to the demands and needs of all competing communities."

As early as 1893, it was well understood by the Commission that the demands for absolute equality among localities can never be satisfied. In an address by Interstate Commerce Commissioner W. G. Veazey, before the Railway Congress at Chicago, which is published in an appendix to the Seventh Annual Report of the Commission, it is said:—

"We should not, however, expect to arrive at purely ideal results. It is idle to look forward to an adjustment of rates which as applied to localities and differently circumstanced persons, will bear no heavier upon one than upon another. Such mathematical equality is manifestly unattainable through human endeavor. Not even common control of all railways through consolidated ownership, or government purchase, could accomplish such a task of equalization for thousands of places and millions of persons. Certainly, the much vaunted theory of uniform charges for all traffic would, under the greatly diversified conditions which now prevail throughout the country, have the opposite effect, and inflict greater discriminations than arise under the existing general practice of fixing charges which attract traffic to the various lines. A uniform rate per mile on all traffic for any distance would arbitrarily limit commerce to sections and greatly restrict production."

DISCRIMINATION AGAINST ANY PARTICULAR DESCRIPTION OF PROPERTY.

Prior to the passage of the Act to Regulate Commerce, there were complaints of an alleged improper adjustment of freight classifications of the railroads. It was said that improper discriminations were made between articles of freight and branches of business of a like character, and between different quantities of the same class of freight. Hence, the prohibition of such discrimination found a place in the Act.

The classification is an essential part of the freight tariff, and all classifications are based on discrimination between articles of freight,—discriminations in rates being the very object for which classifications are arranged. As stated in my monograph:—

"It is obvious that every article of freight that is transported over a railroad should, in addition to the cost of *movement,* be charged with its proportion of the expense of general administration, maintenance of roadway, tracks, bridges, buildings, taxes, rents, and, if practicable, interest on the capital invested. It is manifest that if a uniform charge per 100 pounds were made on every article of freight, the rates on the articles of comparatively small value would be prohibitory, and the articles could not be transported, while the rates on articles of greater value would be unnecessarily low, and would not afford the railroad companies sufficient revenue.

"Railroad classifications are made for the purpose of distributing this charge in accordance with the freight rates that each article can reasonably bear, considering the value of the service to the shipper or consignee, and having in view the greatest possible development of traffic by means of the lowest practicable rates; so that a railroad company may realize the largest possible earnings obtainable from the traffic under the circumstances.

"These are the main considerations in grouping together into classes the articles of freight to be trans-

ported over a road, the rates on the several classes having previously been established.

"There are other considerations, such as the character of the freight, whether light or bulky, perishable or easily damaged, requiring special care in handling, whether carried at owner's or carrier's risk, whether the cost of loading and unloading is exceptionally high, whether the articles are moved in carload quantities, or in quantities less than carload, and many others that could be mentioned. It cannot be expected that the classification be adjusted according to fixed rules or principles, or with any approach to mathematical accuracy. All classifications are necessarily tentative, and subject to frequent changes suggested by actual experience in the practical working of the road. In fact, the present classifications are a growth, and not a manufacture.

"The conditions and circumstances bearing upon rates and classifications are of an endless variety. The traffic men who are charged with the adjustment of classifications must have large experience, and thorough knowledge of the conditions and circumstances surrounding each case, and must possess good sound judgment and untiring industry in order to adapt a classification to the needs and requirements of the largest possible number of shippers in any particular territory. These conditions and requirements vary in different sections of the country, and in the same section of the country at different times. Hence, the establishment of one uniform classification for the entire country, while it is extremely desirable, is impracticable. Such uniformity could only be established either at a great and unnecessary sacrifice of revenue to the railroads by making rates on certain articles unnecessarily low, or by excluding many articles from distant markets that under a properly adjusted classification can be transported at a profit to the shipper and to the railroads. Even if such uniformity were once established, it could not be maintained, because of the changes that necessarily have to be made in order to adapt a classification to the varying conditions in different sections of the country at different times."

DISCRIMINATION AGAINST ANY PARTICULAR DESCRIPTION OF PROPERTY. CLASSIFICATION.

Efforts were made some years ago to regulate classification by legislation, and a bill was introduced in Congress enforcing uniformity. The Interstate Commerce Commission, however, after a careful investigation of the subject, concluded in its Annual Report for 1891, as follows:—

"The Commission desires to repeat, what it has in substance said before, that it is its firm conviction that no public agency can possibly be so competent to deal with this question as the carriers themselves. The existing classifications are the result of long study in immediate practical connection with the transportation interests of the different sections of the country represented by them; and the experts who have made them, have, in gradually bringing them to the condition in which they are now found, represented quite as much the conflicting and competing interests of different sections as they have the conflicting and competing interests of the carriers themselves. Any tribunal which should be created or designed for the purpose of unifying their work would necessarily begin with making careful study of these several interests on all sections, understanding as it must that while unification would be to the general benefit of the country, there must unavoidably be changes which, while benefiting some interests and some sections, must throw corresponding loss or injury upon other interests or sections, and this not infrequently in the same line of business."

There have been few complaints in recent years of unjust discrimination against articles of freight. What the people desire most is a uniform classification operating throughout the whole country. As already stated, such uniformity could only be attained if the circumstances under which different articles are produced, manufactured and shipped were uniform, and remained so in all sections of the country. But this is not the case, and uniformity of classification, even if it could be established and maintained, would be destructive of its very object.

Some years ago a committee of railroad experts were appointed, charged with the duty of revising the classifications so as to secure uniformity. But after many months of arduous labor, they found it impracticable to reach a conclusion. While these efforts have failed, considerable progress has been made in reducing the number of classifications other than those local in this country; and now we have three main classifications, viz.:

1. The Trunk Line Classification, which covers the territory from New York to Chicago, and north of the Ohio River.

2. The Southern Classification, covering territory east of the Mississippi and south of the Ohio Rivers.

3. The Western Classification, covering territory west of Chicago.

HAVE DISCRIMINATIONS CREATED TRUSTS?

We have found in the course of this inquiry, that competitive warfare between railroads, if long continued, must result in ruin of these properties. This is also true of reckless competition between industrial and commercial enterprises. Railroad consolidations and industrial trusts have their origin in a common cause,—the effort to protect invested capital against the evils resulting from unrestrained competition. Efforts to attain this end by means of agreements between the managers of these enterprises having proved futile, as was the case with the agreements between railroads, a plan similar to that of community of interest was at first applied to the operation of industrial enterprises. Combinations or so-called trusts were formed, which acquired all or a majority of the stock in several important corporations, and exercised a general supervision and control of the operations of the

constituent members,—without, however, extinguishing their individual organization, or their titles to their properties.

The objects and the main weapons of defence, of these combinations, are a reduction of the cost of production to a minimum; increased efficiency in operation by means of good organizations, enlargements of the markets, especially foreign markets, the employment of the most modern, labor-saving machinery, and production on a large scale, so that small margins of profits may result in adequate remuneration.

This necessitated the combination of large capital, great resources being needed in the extension of modern industries. The elimination of rival industries by inducing the owners to join the trusts, or by crushing them out of existence in case of refusal, was, of course, essential to the successful operation of these trusts.

It has been said that rate discrimination in favor of large shippers has created these trusts. This is erroneous. It is true that, in some cases, trusts have been assisted to some extent by these discriminations in attaining their objects sooner than they would otherwise have been able to do. It is reasonable to suppose, however, that sooner or later, the command of a larger capital and superior organization would have driven some of their rivals out of the field, even without these discriminations.

It is obviously not for the interests of the owners of railroads to encourage the concentration in the hands of a few trusts or combinations operating at places beyond the termini of their roads, of a considerable portion of the traffic upon which they have to depend for their revenue. Their interests are best served by a large number of smaller industries located on or adjacent to the lines of their respective roads. This was fully recognized; and long before the law made rebates a crime, railroad man-

agers knew that unjust discrimination was a great blunder.

But they were powerless to enforce the maintenance of established tariffs by voluntary agreements between competing roads, legislation having deprived them of the best means of preventing rate-cutting; that is, by a division of traffic, which removed, to some extent, the motive for rate-cutting.

The large shippers were not slow to take advantage of free competition. They used one road against the other, giving their business to the lowest bidder. In fact, they practically dictated their own terms, in some instances boycotting railroads that refused to submit to their dictation. It is highly probable that if contracts for a division of traffic had been legalized and made enforceable, rates would have been better maintained, and the trusts would not have acquired such great powers over the railroads.

The trusts were looked upon with suspicion by the public, which naturally sympathized with the weaker parties that were being forced to the wall. Some of the objectionable methods they adopted aroused the hostility of the people, which found expression in State and Federal anti-trust laws, compelling the trusts to reorganize, abandon their less dangerous ownership of stock, and acquire the ownership and consolidation of the titles to the properties they had theretofore controlled by stock ownership. This led to a closer amalgamation of these properties, and extinguishment of individual titles. The antitrust legislation, instead of being directed against the evils incidental to the trusts, was designed to extinguish the trusts altogether; and it has proved ineffective, as all attempts to control commercial methods by legislative interference must fail.

Mr. Justice Peckham, of the U. S. Supreme Court, said in the Trans-Missouri Freight Association case:—

"To exclude agreements as to rates by competing railroads for the transportation of articles of commerce between the States, would leave little for the act to take effect upon. * * * It is readily seen from these cases that if the act does not apply to the transportation of commodities by railroads from one State to another, or to foreign nations, its application is so greatly limited that the whole act might as well be held inoperative."

It would seem that the Sherman Antitrust Act not only failed to accomplish the purpose for which it was enacted, but that by its application to railroads, it has had a tendency to assist the operation of trusts, so far as discrimination in rates can do so. Paradoxical as it may seem, it is nevertheless true, to some extent, that "free competition" has had a tendency to foster and develop the trusts.

THE TOWNSEND BILL.

AN ACT TO SUPPLEMENT AND AMEND "AN ACT TO REGULATE COMMERCE," APPROVED FEBRUARY FOURTH, 1887.

This Bill, like the Cooper-Quarles Bill, practically confers the rate-making power upon the Commission. Its provisions to which it is necessary to call attention here, are:—

SECTION 1. That whenever upon complaint duly made under section thirteen of the Act to Regulate Commerce, the Interstate Commerce Commission shall, after full hearing, make any finding or ruling declaring any existing rate for the transportation of persons or property or any regulation or practice whatsoever affecting the transportation of persons or property to be unreasonable or unjustly discriminatory, the Commission shall have power, and it shall be its duty, to declare and order what shall be a just and reasonable rate, practice or regulation

to be charged, imposed, or followed in the future in place of that found to be unreasonable or unjustly discriminatory, and the order of the Commission shall, of its own force, take effect and become operative thirty days after notice thereof has been given to the person or persons directly affected thereby; but at any time within sixty days from date of such notice, any person or persons directly affected by the order of the Commission, and deeming it to be contrary to law, may institute proceedings in the court of transportation sitting as a court of equity, to have it reviewed, and its lawfulness, justness or reasonableness inquired into and determined.

SEC. 2. Provides that when the rate substituted by the Commission is a joint rate, and the carriers, parties thereto, fail to agree upon the apportionment thereof among themselves within twenty days after notice of such order, the Commission may, after a full hearing, issue a supplemental order declaring the portion of such joint rate to be received by each carrier, party thereto, which shall take effect of its own force as part of the original order.

The second section also provides that any rate, whether single or joint, which may be fixed by the Commission, shall for all purposes be deemed the published rate of such carrier, and subject to the provisions of the Elkins Act.

SEC. 4. Provides that if any party shall at any time neglect to obey or perform any order of the Commission mentioned in sections one and two of this Act, the Commission may apply by petition to the court of transportation to enforce obedience to its order by writ of injunction or other appropriate process; and in addition thereto, the offending party shall for each day of the continuance of such refusal, be subject to a penalty of $5,000.

SEC. 5. Provides that the word "person" or "persons" wherever used in this Act, shall be deemed to include corporations.

SEC. 6. Increases the number of Interstate Commerce Commissioners from five to seven, and their salaries to ten thousand dollars each, per annum,—the President to appoint the two additional Commissioners. Not more than four Commissioners shall be appointed from the same political party.

SEC. 7. Provides for the establishment of a court of record, with full jurisdiction in law and equity, to be called the court of transportation, which shall be composed of five circuit judges of the United States, three of whom shall constitute a quorum, who shall be designated by the President for terms of one, two, three, four, and five years, respectively.

SEC. 8. Provides that the court of transportation shall hold four regular sessions each year at the City of Washington, beginning on the first Tuesday in March, June, September and December, and that a quorum of said judges may appoint special sessions of the court to be held at other places.

SEC. 9. Provides for the appointment by the President of five additional circuit judges.

SEC. 10. Gives the court of transportation exclusive original jurisdiction of all suits and proceedings of a civil nature in law or equity, brought in the name of the United States or the Interstate Commerce Commission, to enforce the provisions of this Act, the Act to Regulate Commerce and amendments thereto, approved February 4, 1887, and of the Elkins Act, and any law that may be enacted hereafter amendatory of or supplementary to

those Acts. The court of transportation also has exclusive original jurisdiction of all suits and proceedings of a civil nature in law or equity, brought to enforce obedience to or to restrain, enjoin or otherwise prevent the enforcement and operation of any order, ruling, or requirement, made and promulgated by the Commission under the authority of any power conferred upon it by either of the aforesaid Acts, etc.

SEC. 11. Provides that in the exercise of the jurisdiction defined and conferred upon it by this Act, the court of transportation shall possess all the powers of a Circuit Court of the United States, so far as the same may be practicable.

SEC. 12. Provides that in every suit or proceeding brought in the court of transportation to enforce orders, rulings or requirements of the Commission, or to restrain, enjoin or otherwise prevent their enforcement and operation, the findings of fact made and reported by the Commission shall be received as *prima facie* evidence of each and every fact found; and no evidence shall be admissible which was not offered, but which, with the exercise of proper diligence could have been offered, upon the hearing before the Commission: but any evidence not existing, or which could not, with due diligence, have been known to the parties at the time of the hearing before the Commission, may be admitted.

SEC. 14. Provides amongst other things that any justice of the court of transportation may, upon reasonable notice to the parties, make and direct and award at chambers, and in vacation as well as in term, all such process, commissions, orders, rules, and other proceedings, including temporary restraining orders, wherever the same are grantable, as of course, according to the rules and practice of the court.

SEC. 15. Provides that in all cases affected by this Act, where, under the law heretofore in force, an appeal or writ of error lay from the final order, judgment or decree of any Circuit Court of the United States to the Supreme Court, an appeal or writ of error shall lie from the final order, judgment or decree of the court of transportation to the Supreme Court, and that court only, and must be taken within thirty days from the entry thereof: and said Supreme Court shall give precedence to the hearing and decision of such appeal over all other cases except criminal cases; and the rules and regulations which under existing law govern appeals and writs of error from the several Circuit Courts to the Supreme Court, shall govern appeals and writs of error from the court of transportation, except as herein otherwise provided.

The thoughtful reader upon an examination of the provisions of this bill, is amazed at its radical departure from the wise and conservative policy that was inaugurated by Congress, when, in 1887, it passed the Act to Regulate Commerce, which policy was continued during the last eighteen years. He naturally inquires: have any great changes taken place in the railroad situation that necessitate legislation so drastic as to practically wrest from the owners of railroads, the control of their properties?

The answer must be that there have been changes, but that they have all been for the better; that complaints of unjust discrimination in the form of rebates have greatly diminished, and that it is reasonable to expect that the enforcement of existing laws will result in still further improvements.

How, then, is this radical departure to be accounted for? There is but one adequate explanation. The House of Representatives, in passing the Townsend Bill, was

actuated by the desire to comply with the wishes of the President, so vigorously and earnestly expressed in his message, and also to meet what it had been made to believe to be a general demand of the people for Government rate-making.

We have already alluded to the agitation for additional legislation, and its source, or origin; and we will now consider the

RECOMMENDATIONS OF PRESIDENT ROOSEVELT IN HIS MESSAGE TO CONGRESS.

"Above all else, we must strive to keep the highways of commerce open to all on equal terms; and to do this it is necessary to put a complete stop to all rebates. Whether the shipper or the railroad is to blame makes no difference; the rebate must be stopped; the abuses of the private car and private terminal-track and side-track systems must be stopped, and the legislation of the Fifty-eighth Congress, which declares it to be unlawful for any person or corporation to offer, grant, give, solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce whereby such property shall by any device whatever be transported at a less rate than that named in the tariffs published by the carrier, must be enforced.

"For some time after the enactment of the Act to Regulate Commerce, it remained a mooted question whether that act conferred upon the Interstate Commerce Commission the power, after it had found a challenged rate to be unreasonable, to declare what thereafter should, *prima facie*, be the reasonable maximum rate for the transportation in dispute. The Supreme Court finally resolved that question in the negative, so that as the law now stands the Commission simply possess the bare power to denounce a particular rate as unreasonable.

"While I am of the opinion that at present it would be undesirable, if it were not impracticable, finally to clothe the Commission with general authority to fix railroad

rates, I do believe that, as a fair security to shippers, the Commission should be vested with the power, where a given rate has been challenged and after full hearing found to be unreasonable, to decide, subject to judicial review, what shall be a reasonable rate to take its place; the ruling of the Commission to take effect immediately, and to obtain unless and until it is reversed by the court of review.

"The Government must in increasing degree supervise and regulate the workings of the railways engaged in interstate commerce; and such increased supervision is the only alternative to an increase of the present evils on the one hand, or a still more radical policy on the other. In my judgment the most important legislative act now needed as regards the regulation of corporations is this act to confer on the Interstate Commerce Commission, the power to revise rates and regulations, the revised rate to at once go into effect, and to stay in effect unless and until the court of review reverses it.

"Steamship companies engaged in interstate commerce and protected in our coastwise trade should be held to a strict observance of the Interstate Commerce Act."

The President's vigorous denunciation of rebates, and his declaration that the highways of commerce must be kept open to all on equal terms, produced a universal echo in the hearts of the people; and in no quarter was this part of the message received with a warmer welcome than by the owners and managers of railroads, who had labored long and earnestly to suppress the evils of unjust discrimination.

But the impartial observer is astonished to find that the Townsend Bill does not contain a single provision that has a direct bearing on the rebate question. Moreover, he knows that Congress had previously dealt in the most effective way with the subject by passing the Elkins Act, of which the Interstate Commerce Commission in its Seventeenth Annual Report says:—

"It has proved a wise and salutary enactment. It has

corrected serious defects in the original law, and greatly aided some of the purposes for which that law was enacted."

If any additional legislation were needed, would the delegation of power to the Commission to fix rates, cure the rebate evil? It is obvious that rates fixed by the Commission can be cut as easily and as often as rates made by the railroads.

Upon a further examination of the President's message, the reader, if he is at all familiar with railroad transportation, will find that the President was not aware of the fact that to give the Commission power to revise rates, to take effect immediately, would be to finally clothe the Commission with general authority to fix railroad rates; and this, he declares, would be "at present undesirable, if it were not impracticable." For it is a well known fact that, owing to the interdependence of rates, such revision of rates need only be exercised in comparatively few cases, in order to fix rates for a large section; and that, by a continued process of revision, the rates for all the railroads in the country could be fixed by the Commission. This was well expressed by the Supreme Court of the United States in its decision of the Maximum Rate cases, viz.:—

"There is nothing in the act requiring the Commission to proceed singly against each railroad company for each supposed or alleged violation of the act. In this very case the order of the Commission was directed against a score or more of companies and determined the maximum rates on half a dozen classes of freight from Cincinnati and Chicago respectively to several named southern points and the territory contiguous thereto; so that if the power exists, as is claimed, there would be no escape from the conclusion that it would be within the discretion of the Commission of its own motion to suggest that the interstate rates on all the roads of the country were unjust and unreasonable, notify the several roads of such

opinion, direct a hearing, and upon such hearing, make one general order, reaching to every road and covering every rate."

The President was manifestly misled by the specious arguments of some advocates of drastic legislation, who, conscious of the fact that the proposition to empower a Government bureau to fix rates for all the railroads in this vast country, would prove repugnant to the common sense of the people, have declared that they do not ask that general rate-making power be conferred upon the Commission,—that they concede to the railroads the right to make their rates in the first instance: but that what they do ask is that the Commission, when it has found a rate made by a railroad to be unreasonable, shall have the power to fix what it considers to be a reasonable rate, and that such rate be effective in the future. They further say that this power was exercised by the Commission without protest from the railroads, for six, and some say for ten, years. They claim that Congress intended to confer the rate-making power upon the Commission by the Act to Regulate Commerce of 1887, and that it was generally believed that purpose had been attained until the Supreme Court in the Social Circle and Maximum Rate cases interpreted this power out of the Act, thus emasculating it, and rendering it of no value to the public. And these advocates ask that Congress shall restore to the Commission, the power which it previously possessed, and which the court is alleged to have taken away from it.

These claims seem very plausible, but become wholly fallacious when examined in the light of all the facts bearing on the question. As we have seen, they have even misled so intelligent a man as President Roosevelt.

It is not true that Congress intended to confer the rate-

making power upon the Commission. The Senate Select Committee expressly advised against it, saying, after a full discussion of the subject:—

"Those who have asked the adoption of this plan of regulation have suggested the establishing of rates by a commission, but it is questionable whether a commission, or any similar body of men could successfully perform a work of such magnitude, involving, as it would, infinite labor and investigation, exact knowledge as to thousands of details, and the adjustment of a vast variety of conflicting interests."

At the time this report was written, there were only 125,000 miles of railroad in operation in this country.

The debates that preceded the enactment of the law conclusively prove that there was no such intention on the part of Congress. When the Act was under discussion, the writer followed the debates in both Houses of Congress very closely; and he distinctly remembers that the rate-making power was not seriously considered. In fact, at that time that question did not cause any anxiety to the managers and owners of railroads. What did give them great concern was the insertion of the fifth or anti-pooling article, and the question whether Congress would make the fourth or long and short haul section an inflexible mileage rule, as proposed by Mr. Reagan.

Senator Cullom, who, in 1886, was Chairman of the Senate Select Committee, and is a member of the present Senate Committee on Interstate Commerce, recently stated at a session of that Committee, in reply to a question by Senator Foraker:—

"There is nothing in the law that justifies the conduct of the Commission in making rates to take effect in future; and nobody ever pretended there ever was any such thing. But they had power, we supposed (and I think that has been sustained), to determine whether a rate now

existing is reasonable or unreasonable. Then it is for the railroads to reduce the rate in accordance with the order."

The impression that the Commission exercised the power of rate-making for six or ten years without opposition on the part of the railroads, is also erroneous.

As early as December, 1888, in an official communication to the Commission, the writer called its attention to the fact that it has not the power to make rates generally, but only to determine whether rates imposed by the railroads are in conflict with the statute. This was in accordance with the Commission's own opinion expressed in the case of *Thatcher vs. Fitchburg R. R. Co., 1 I. C. Rep., 356.* It is true that this case did not call for the exercise of the power of fixing rates; but it is interesting as showing that the Commission knew at that time that it had no power to fix rates.

In 1889 and 1890 the question came before the Circuit Court of the United States (*37 Fed. Rep., p. 567, and 43 Fed. Rep., p. 37*); and that court held in substance that the Commission had no power to make future rates.

In my monograph on The Adjustment of Railway Freight Tariffs, and the analysis of the opinion and decision of the Commission in the Maximum Rate cases, published in 1894, will be found a chapter headed,—"*Authority of the Interstate Commerce Commission to establish Rates for Common Carriers,*" from which the following are extracts:—

"The Act to Regulate Commerce leaves the important function of establishing tariffs for the transportation of passengers and property to the responsible officers of the transportation companies. It would be impossible for the five Commissioners, even if they had the requisite knowledge and experience of the business of transportation, to establish tariffs on interstate traffic for the 1890 railroads, aggregating 176,461 miles (see page 11, Sixth

THE COMMISSION DID NOT EXERCISE THE RATE-MAKING POWER WITHOUT PROTEST BY THE RAILROADS.

Annual Report on the Statistics of Railways in the United States, for the year ending June 30, 1893), that is to say, to perform the work which requires the constant labor of several thousand trained officials, who are thoroughly familiar with the conditions and circumstances that govern in the establishment of such tariffs.

"The Commission has no power to make the tariffs for the carriers subject to the Act to Regulate Commerce.

"The only power which the Commission has in regard to the reasonableness of rates, is to decide, upon the complaints of shippers, the question of the reasonableness of the specified rates complained of; and if the Commission shall find, upon a proper investigation of specific charges or complaints, that the particular rates complained of are unreasonable, it has the power to order such carriers to cease and desist from charging the particular rates which the Commission decides to be unlawful. But it does not follow that the Commission has the power to prescribe what the maximum rates shall be in the cases that come before it.

"In view of the interdependence of rates in the same territory, and even in territories widely separated, it is plain that the Commission could by the frequent exercise of the power to prescribe maximum rates, which it has recently assumed to exercise, accomplish indirectly what the law does not authorize it to do directly; that is, to establish maximum rates for the carriers that are subject to the act. * * * It follows from what has been stated that the Act to Regulate Commerce does not confer authority upon the Interstate Commerce Commission to establish for carriers subject to it, their freight tariffs on interstate traffic; and that the Commission cannot by an ingenious process of indirection accomplish what it cannot accomplish directly."

It is true that the railroad managers have acquiesced in a *large number of decisions and recommendations of the Commission.** They have done so both before and

* President Spencer stated in his testimony before the House Committee on Interstate Commerce, that of the questions which have been presented to the Commission during the last eighteen years, 90 per cent. have been disposed of without formal hearings and decisions on the part of the Commission; 10 per cent. have been the subject of formal hearings and decisions, and less than one-fifth of that 10 per cent., viz., 2 per cent. of the total, have been the subject of litigation under the decisions of the Commission.

after the decision of the U. S. Supreme Court in the Maximum Rate cases. But this is no proof that they were ignorant of the provisions of the Act until it was interpreted by the Supreme Court. It only shows that they earnestly desired to co-operate with the Commission, and to comply with its just and reasonable conclusions.

IS RATE-MAKING BY THE GOVERNMENT PRACTICABLE?

At the beginning of this inquiry I endeavored to show how railroad freight tariffs are made in this country; and I pointed out some of the difficulties attending the adjustment of freight rates, and related at length what efforts had been made by railroad managers and by the Government, to regulate rates so as to avoid unjust discrimination. The impartial reader who has followed me can have no hesitancy in concluding that rate-making by the Government is wholly impracticable. Indeed, it is obvious that it is not within the mental and physical powers of five commissioners, however learned in the profession of the law, or for any other bureau, no matter how constituted, to do the work of hundreds of trained traffic officials.

If any argument were needed, it would be furnished by the Commission itself. In its First Annual Report of December, 1887, in referring to the petition for relief under the dispensing clause of the fourth or long and short haul section of the Act, Judge Cooley, Chairman of the Commission, a distinguished jurist who was very familiar with railroad transportation, says:—

"Moreover, an adjudication upon a petition for relief would in many cases be far from concluding the labors of the Commission in respect to the equities involved, for questions of rates assume new forms, and may require to

be met differently from day to day; and in those sections of the country in which the reasons or supposed reasons for exceptional rates are most prevalent, the Commission would, in effect, be required to act as rate-makers for all the roads and compelled to adjust the tariffs so as to meet the exigencies of business while at the same time endeavoring to protect relative rights and equities of rival carriers and rival localities. This in any considerable state would be an enormous task. In a country so large as ours, and with so vast a mileage of roads, it would be superhuman. A construction of the statute which should require its performance would render the due administration of the law altogether impracticable, and that fact tends strongly to show that such a construction could not have been intended."

If this is true of the adjustment of rates under only one of the sections (fourth) of the Act to Regulate Commerce, what Herculean labor would it require to establish all the interstate rates for all the railroads of this large country!

It is a matter of surprise that men so intelligent as the Commissioners, and who have such good opportunities to observe the facts bearing upon the adjustment of rates, should, through misapprehension of the character of the work involved, fail to realize the greatness of the work, and of the power for which they ask,—the insuperable difficulties, and the immense responsibility attending the exercise of this power.

Can it be that under the stimulus of the love of power natural to man, their earnest desire to promote the public welfare has acquired the force of a passion that blinds them to the fact that rate-making by the Government is impracticable?

We have seen that, owing to the interdependence of rates, there is no escape from the conclusion that the exercise of the power of revision must gradually but inevitably bring all the important rate adjustments of the

country under the control of the Commission. And it is obvious that rate-making, from the nature of the work, must be continuous. It does not admit of spasmodic or intermittent action. Piecemeal adjustment or tariff tinkering is impracticable. Rate adjustment is not only a continuous work, but must be carried on simultaneously in every section of the country. As the Commission has well said, "Matters of importance frequently require prompt action in various parts of the country at the same time." And rate-making by the Government would become cumulative. Owing to the interdependence of rates, every new adjustment the Commission prescribes makes new work; and it may be said that this work increases at almost a geometrical ratio. We shall endeavor to illustrate the interdependence of rates further when we come to inquire into the effects of rate-making by the Government.

In its Fourth Annual Report (1890), the Commission says:—

"The railway mileage of this country in round numbers is about 160,000 miles. The number of railway employees exceeds 700,000, and adding to these the number connected with railroad transportation in various capacities, such as officials of roads, officers and employees of associations, traffic solicitors, legal advisers, and others, the aggregate is not far from a million, or nearly one-twelfth of the adult male population of the country. The business done includes the carriage of 540,000,000 tons of freight and 472,000,000 of passengers. The enormous extent of the subject-matters of regulation is shown by these statements. Any criticism upon the efficiency of regulation would obviously be defective if it failed to take note of the vast number of persons and the extent of the business to be regulated. The extent of the country is also of vast importance. Railway regulation in a small and compact country, where all the carriers are easily kept under observation, and where the circumstances of carriage in all parts are substantially alike, is a small mat-

ter compared with the regulation in a country so extensive as this, where the transportation is subject to such variety of circumstance and where differences in condition of carriage in the different sections are so striking and so peculiar. That which may be a simple task to a regulating commission in any other country is obviously a far more complicated and difficult undertaking in the United States, and one that calls for ceaseless exercise of vigilance and exacting labor. A commission in this country has a field of jurisdiction of enormous extent, necessarily giving rise to a great variety of duties demanding daily attention. *Matters of importance frequently require prompt action in various parts of the country at the same time.** A performance of such imperative duties as to make investigations, to keep watch over the filing and publication of tariffs, to examine and revise classification and rates, to collect and tabulate statistics, and to prepare decisions upon controverted questions, leaves little if any opportunity for the commissioners personally to do more than to lay down general rules for the regulation of the business under the law. Prosecution of offenders for violations of the law are undoubtedly necessary and important means for the effectual enforcement of its provisions; and several prosecutions of this character have been instituted and carried on at the instance of the commission. But the enforcement of the rules laid down, and especially of the penal provisions of the statute, must largely be left to the parties injured by their violations, or to the public authorities in the sections where the violations occur."

If the performance of the imperative duties mentioned by the Commission left it little if any opportunity to do more than to lay down general rules for the regulation of business under the law at the time when the railway mileage of this country was about 160,000 miles, the number of employees exceeding 700,000, and the business done included the carriage of about 540,000,000 tons of freight, and about 470,000,000 passengers, could the Commission

* Italics are mine.

discharge its duties more efficiently now that the railway system has expanded so that the mileage in 1903, was about 208,000 miles, the number of employees over 1,300,000, the freight tonnage carried during the fiscal year ended June 30, 1903, being about 1,300,000,000 tons, and the number of passengers carried nearly 695,000,000?

As a matter of fact, the enormous work imposed upon the Commission, and the variety of its duties, have prevented an efficient enforcement of the Act to Regulate Commerce. Can any reasonable person say that the Commission, in addition to its present duties, could fix the rates for all the railroads of this country, and keep them adjusted to the various and varying commercial conditions? Is not such an idea preposterous? It might be said that the fabled work of Sisyphus was a pleasant pastime as compared with the enormous task such labors would impose upon the Commission.

IS RATE-MAKING BY THE GOVERNMENT NECESSARY, IF IT WERE PRACTICABLE?

The answer involves the question: what are the existing evils that cannot be corrected by existing legislation?

Some idea of these evils can be obtained from an examination of the complaints that have been made to the Commission in recent years. The subjects of these complaints range from overcharges on small shipments, alleged wrongful freight classifications, failure to furnish cars, excessive demurrage charges, etc., to the relative adjustment of rates that affect large business communities and sections.

Of course numerous complaints arise from the fact that shippers will always want lower rates of freight, just as they always want lower prices on what they have to

buy. In the case of the price of transportation, the divergent opinions of the buyer and seller cannot be reconciled nor adjusted by bargaining, as the law forbids railroads to grant special rates. Hence, naturally, shippers complain that the rates are arbitrary, and unreasonably high. The Commission publishes in each annual report, a list of these complaints, classifying them as formal and informal. The formal complaints are those that are investigated upon formal petitions filed with the Commission under section thirteen of the Act. Informal complaints are those presented by letter under the twelfth section, and which the Commission endeavors to adjust by correspondence with shippers and carriers.

The Commission has submitted to the Senate Committee on Interstate Commerce, in reply to a Resolution of the Senate of January 16, 1905, a report showing its work in respect to formal and informal complaints, hearings, decisions of the courts, exorbitant rates, unreasonable rates, and rebates.

It appears from an abstract of this report made by Joseph Nimmo, statistician, formerly Chief of the Bureau of Statistics, and a well known writer on economics, that from January 1, 1900, to March 1, 1905, 2,296 informal complaints were made to the Commission, of which number 2,171 have been disposed of without the interposition of the courts.

The Commission states in its report that it is not able to give the number of informal complaints prior to January 1, 1900. The total number of formal complaints made to the Commission from April 6, 1887, to March 1, 1905, were 770.

Which were disposed of as follows:

Number which have come to a final hearing	400	
Settled or discontinued	206	
Indefinitely postponed	74	
Heard, but not decided	20	
Partially heard	27	
No hearing	43	770
According to Mr. Nimmo's abstract, the total number of formal complaints, from 1887 to 1905, alleging exorbitant rates, were		351
Of which there were disposed without formal hearing	188	
Disposed of without decision	24	
Decided by Commission	139	351
The total complaints involving unjust discrimination were		366
Settled without formal hearing	175	
Disposed of without investigation	27	
Decided by Commission	164	366
The abstract also gives the cases involving exorbitant rates, appealed by the Commission to the courts, from April 5, 1887, to March 1, 1905, as		15
In effect sustained by the Courts	3	
Not sustained	12	15
During the same period there were 32 cases of unjust discrimination appealed to the Courts, in which:		
The Commission was sustained	8	
Not sustained	24	32*

"The Commission reports 27 formal complaints for violations of published rates, or failure to publish rates, since the enactment of the Elkins Law of February 19, 1903, of which ten have been heard and one dismissed. These 27 complaints embrace all the offences denounced by the Act; namely, failure to file or publish tariffs of rates and charges, rebates, concessions and discriminations in respect to the transportation of property."

The abstract concludes with the following résumé:

"The general conclusion from this elaborate report by the Commission is, that out of many millions of freight transactions yearly, the following results in the nature of regulation have been reached:

"1. Only three cases of exorbitant rates have been 'in effect' sustained by the courts; or, on the average, one case during each six years of the life of the Commission.

"2. Only eight cases of unjust discrimination have been proved in the courts, which, on the average, is less than one case during each two years of the life of the Commission.

* It is proper to say in justice to the Commission, that the cases in which the Courts did not sustain it include a number of cases which were decided by the Commission when it supposed it had power to name rates for the future.

"3. The total number of formal and informal complaints reported by the Commission is 3,066, of which only 45 or 1½ per cent. have been appealed to the courts; the rest (98½ per cent.) having been disposed of by the Commission.

"4. The total number of decisions rendered by the Comsion and by the courts as to exorbitant rates and unjust discriminations is really infinitesimal as compared with the many millions of freight transactions yearly.

"The foregoing statements clearly prove the efficiency and sufficiency of the Act to Regulate Commerce as amended. They also reflect great credit upon the conduct of the American Railroad system, as well as upon the administration of the present statutory regulation of the railroads. At the same time they utterly repel the revolutionary idea of establishing bureaucratic government in this country for the regulation of interstate commerce. The very assumption that more drastic statutory legislation than that now in force is needed is upon its face preposterous."

From a statement made by Walker D. Hines in his testimony before the Senate Committee on Interstate Commerce, it appears that from January 1, 1900, to January 1, 1905, the Commission issued 13 orders in cases of unreasonably high rates, of which 10 were obeyed by the carriers, 2 were not obeyed, and 1 was not sustained by the court.

During the same period the Commission issued 6 orders in long and short haul cases, 3 of which were complied with, and 3 were not sustained by the courts.

There were only 3 orders made by the Commission in cases of discrimination between localities, of which 1 was obeyed by the carrier, 1 sustained by the court, and 1 not sustained by the court.

This makes 22 orders in all in five years, of which 14 were obeyed by the carriers, 3 were not obeyed, and 5 were not sustained by the courts.

It is safe to say that no fair-minded person will seriously contend that existing legislation is inadequate to deal with the existing evils, as indicated by the comparatively few cases that have come before the Commission and before the courts. The Act to Regulate Commerce, supplemented by the Elkins Act, confers ample power upon the Commission to deal with every complaint of unjust discrimination.

The Commission is required to execute and enforce the provisions of the Act. It has the power to prescribe the publicity of rates and the filing of tariffs. It has the power to inquire into the business of carriers, and to require them to furnish full and complete information. It has the power to investigate by such means as it shall deem proper, any complaints made by any person, firm, corporation, association, etc., as to anything done by any carrier; and it can institute an inquiry on its own motion.

It has the power to require the attendance of witnesses, the production of documentary evidence, and to invoke the aid of the courts to compel witnesses to testify; and the claim that giving testimony may tend to incriminate a witness does not excuse.

It can award damages, and prescribe the measure of reparation to any injured parties; and if its order is not obeyed, it can institute proceedings in the courts at the expense of the Government and without cost to the complainant, to enforce its orders; and in the event the courts sustain the decision, the carrier must not only pay the cost of the defence, but also the attorney fees for the prosecution.

If any argument were needed in support of the fact that existing legislation can correct existing evils, it can be found in the reports of the Commission itself. In its annual report for 1903, it says:—

"No one familiar with railway conditions can expect

that rate-cutting and other secret devices will immediately and wholly disappear, but there is basis for a confident belief that such offences are no longer characteristic of railway operations. That they have greatly diminished is beyond doubt, and their recurrence to the extent formerly known is altogether unlikely. Indeed, it is believed that never before in the railroad history of the country have tariff rates been so well or so generally observed as they are at the present time.

"While the amended law is a potent factor in doing away with rate-cutting, other influences have contributed to the improved conditions now prevailing. Among these, of course, is the great increase in traffic, which in most parts of the country continues to move in unprecedented volume. * * * *

"The test of the law will come when a lessened volume of competitive traffic invites sharp contest for business. In that case, however, we believe the law has now so much more vitality and can be so much better enforced that unlawful rates will never again reach their former magnitude. *In its present form the law appears to be about all that can be provided against rate-cutting in the way of prohibitive and punitive legislation. Unless further experience discloses defects not now perceived, we do not anticipate the need of further amendments of the same character and designed to accomplish the same purpose.*"*

In quoting from this (Seventeenth) Annual Report of the Commission, it is proper to state, however, that notwithstanding the improvements in the operation of the law referred to, the Commission renews its suggestion to Congress that the rate-making power be conferred upon it; and among other reasons which, in its opinion, give special force to that recommendation, is a matter growing out of the Elkins amendment, the effect of which, it says, has in many cases been to bring about an increase of railroad charges. It says:—

"Although the injustice occasioned by secret conces-

* Italics are mine.

sions was largely removed, the shippers who had formerly been favored were compelled to pay higher rates of transportation. * * * Barring discriminations between shippers caused by the payment of rebates, the secret rates actually applied were perhaps, in some cases less unfairly adjusted, as between different localities and articles of traffic, than were the rates named in the tariffs. When these tariff rates are exacted from all shippers, as they now are for the most part, and such rates remain unchanged or are materially advanced, the effect is to accentuate any injury which is suffered by the public. In other words, the application of tariff charges which the amended law quite effectually secures, brings into stronger light and calls more attention to rates claimed to be unjust or unfairly related."

As we shall inquire later into the advances that have been made in the rates during recent years, and also into the effect of Government rate-making upon the relation of rates affecting different localities, it is not necessary to comment here on this part of the Commission's Report.

No doubt the restriction of the practice of rebating must tend to increase the complaints of shippers, and many former beneficiaries of the practice will favorably consider any proposition looking to the establishment of a tribunal that would aid them in compelling the railroads to give them such rates as they may consider themselves entitled to.

In the same Report (Seventeenth) the Commission refers to the evils resulting from excessive payments by railroad companies for the use of private cars, particularly those owned or controlled by shippers, such as refrigerator cars, tank cars, and stock cars. As we have seen, the President in his message refers to the same evil, as well as to the abuses of the private terminal track and sidetrack systems, which he says must be stopped.

It is claimed that the earnings of private cars are excessive (one cent per car per mile run, and in some cases three-fourths of a cent), and that this allowance enables

the owners to pay rebates, or in cases where they are themselves the shippers, the arrangement produces unjust discrimination; and that this also applies to the allowance of an excessive proportion of the freight rate to the owners of short railroads and sidings.

The private car line question has been the subject of an investigation by a sub-committee of the House Committee on Interstate Commerce, and has also been before the Senate Committee. It is not necessary to examine the merits of the question here, it being sufficient to say that if these allowances are excessive, it is clearly within the power, as it is for the interest, of the railroads themselves, to apply the necessary correction; and that, failing to do so, Congress can easily amend the Act.

But it should be borne in mind that it is impossible to frame a law that effectively deals with all the causes and devices that may produce unjust discrimination, and that it ought to be sufficient to prohibit discrimination itself, however produced. It is clear, however, that rate-making by the Government would in no manner affect or cure such evils.

In view of all the facts we have stated, and many others which might be mentioned, the conclusion seems irresistible that existing legislation can cure all existing evils, and that rate-making by the Government is unnecessary even if it were practicable.

The advocates of additional legislation must have felt that the relatively few complaints of unjust discrimination afforded no adequate pretext for enlarging the powers of the Commission: for they called the attention of the public to some advances in rates made by the railroads since the long depression in business was succeeded by the present general prosperity; and they expressed the fear that consolidations, community of interest, and mergers, might result in further advances.

Among the documents that were circulated during the campaign for additional legislation, one which excited the interest of the public until its numerous inaccuracies were pointed out, is

SENATE DOCUMENT NO. 257.

During the long-continued depression of business, beginning in the early nineties, the railroads made considerable reductions in their freight rates, as they usually do during dull times, in order to stimulate traffic, and to meet the necessities of shippers. Owing to these reductions, which were made mainly by changes in classifications, and to the severe competition between railroads, the average rate per ton per mile in 1899 reached the lowest level in the history of railroads; viz.: 724 thousandths of one cent per ton per mile.

In 1900, or a few years after the beginning of the business revival, the railroads revised their classifications with the view of restoring former rates, and to abolish many unjust discriminations which had been created by the struggle for traffic during the dull times. They also made some direct advances in the rates during that year; and in 1901, 1902 and 1903, additional revised classifications were filed with the Commission. In some cases the changes in rates made them higher than they were previous to their reduction.

The advocates of additional legislation did not fail to call the attention of the public and members of Congress to those advances; and on March 11, 1904, on motion of Mr. Quarles, the Senate adopted the following Resolution:

"*Resolved*, that the Interstate Commerce Commission is hereby directed to furnish the Senate as speedily as may be practicable, a report showing the principal changes in

railway tariff rates, whether resulting from the adoption of new rates or the amendment of freight classifications, and an estimate of the effect of such changes upon the gross and net revenues of railway corporations in the United States during each of the fiscal years ending June thirtieth, nineteen hundred, nineteen hundred and one, nineteen hundred and two, and nineteen hundred and three, as compared with the gross and net revenues that would have been derived by them under the rates and freight classifications in force during the fiscal year ending June thirtieth, eighteen hundred and ninety-nine; and also report the changes in cost of operation and maintenance of said railways for said years."

The letter of the Commission in response to this resolution, with its appendix consisting of its Auditor's report, is known as Senate Document No. 257. Upon an examination of the resolution, the reader who is familiar with railroad accounting will see at a glance that to show the principal changes in the railway tariffs, and the effect of such changes upon the gross and net revenues of the railway corporations during the four years ending June 30, 1903, as compared with the rates and freight classifications in force during the fiscal year ending June 30, 1899, would necessitate the examination of hundreds of thousands of freight tariffs, and of millions of freight waybills. (It appears that during the year ending June 30, 1903, over 165,000 tariffs were filed with the Commission.) And after obtaining by such examination, the increase in gross earnings of the railroads, it would require an elaborate and intricate calculation to ascertain the amount of net revenues the railroads had derived from these advances. It is obvious that no intelligent answer could be made within any reasonable time.

The Commission, however, responded promptly under date of April 7, 1904, stating in substance that it was unable to furnish this information, that "no accurate or

even approximate estimate of the actual effect of specific changes in rates upon the revenues of the carriers can be made."

But the Commission adds an Appendix that contains a statement of its Auditor, and which, it says, is in conformity with the requirements of the resolution as far as practicable.

The Auditor also states that the information called for by the resolution is not available, and "even if it could be obtained, the undertaking would be so enormous as to render it virtually impracticable."

He however furnishes a statement showing the number of advances and reductions made in the Official Classification, the Southern Classification, and the Western Classification during the year 1900. It has been shown by parties who have investigated the report that this statement is erroneous; and moreover, that he has omitted reference to the changes made in classification in 1901, 1902 and 1903, during which years a large number of reductions were made. However, this is of no importance, because a mere statement of the number of these changes can throw no light upon the subject-matter of the inquiry. But the Auditor publishes the following table, "showing the total tonnage and freight revenue of all the railways in the United States for the years ending June 30, 1899, 1900, 1901, 1902, and 1903, with the average rate per ton for each year, except that the figures given for the year last named represent about 98 per cent. of the total operated mileage."

Year ending June 30.	Total number of tons of freight carried.	Total freight revenue.	Average rate per ton.
1899	959,763,583	$913,737,155	$0.9520
1900	1,101,680,238	1,049,256,323	.9524
1901	1,089,226,440	1,118,543,014	1.0269
1902	1,200,315,787	1,207,228,845	1.0058
1903	1,221,475,948*	1,318,320,604	1.0793

* Represents about 98 per cent. of total mileage.

And in connection with this table, he publishes another statement; viz.:

STATEMENT SHOWING THE TOTAL NUMBER OF TONS OF FREIGHT CARRIED BY THE RAILROADS OF THE UNITED STATES FOR THE FISCAL YEARS ENDING JUNE 30, 1899, 1900, 1901, 1902, AND 1903, WITH THE TOTAL REVENUE ACCRUING THEREFROM; ALSO THE REVENUE WHICH WOULD HAVE ACCRUED AT THE AVERAGE RATE OF 95.2 CENTS PER TON FOR THE YEARS ENDING JUNE 30, 1900, 1901, 1902 AND 1903, THIS BEING THE AVERAGE RATE FOR THE YEAR ENDING JUNE 30, 1899, AND THE INCREASE IN THE REVENUE FOR THE YEARS 1900, 1901, 1902, AND 1903 RESULTING FROM THE INCREASE IN THE AVERAGE RATE PER TON FOR THOSE YEARS.

Year ending June 30.	Number of tons of freight carried.	Total freight revenue as charged.	Amount of freight revenue at average rate per ton of 95.2 cents, being the average rate for the year ending June 30, 1899.	Increase.
1899.....	959,763,583	$913,737,155	$913,737,155	.....
1900.....	1,101,680,238	1,049,256,323	1,048,799,587	$456,736
1901.....	1,089,226,440	1,118,543,014	1,036,943,571	81,599,443
1902.....	1,200,315,787	1,207,228,845	1,142,700,629	64,528,216
1903a.....	1,221,475,948	1,318,320,604	1,162,845,102	155,475,502
			Total increase.....	$302,059,897

a The figures for the year 1903 represent about 98 per cent. of the total mileage.

What made the above statement so effective as a campaign document, was the information it seemed to convey to the people that the railroads had overcharged them during the four years ending June 30, 1903, by over $300,000,000: and the inference was drawn that this enormous sum would have been saved to the people if the Commission had been clothed with the rate-making power.

One would think that the Commission, in common fairness to the railroads, would have published in connection with their revenue, a statement showing the actual services they rendered to the public in the transportation of freight.

Strange as it may appear, Senate Document No. 257 does not contain this information. It will be seen from the above table that the Auditor only gives the number of tons transported, and that he has made the average revenue per ton in 1899, the basis of his comparison between the revenues received for that year, and for the subsequent four years.

It is to be presumed that the Commission, in its haste to answer the question submitted to it, overlooked an error so vital as to vitiate the conclusions it reported to the Senate. For the Commission must know that the mere number of tons of freight hauled over the roads does not represent the actual work performed, for which the railroads receive compensation. Some freights are carried a few miles; others are hauled hundreds and even thousands of miles.

The Auditor's statement does not distinguish between services consisting of one ton of freight hauled ten miles, and one ton of freight hauled a thousand miles; all the tons are put together indiscriminately, regardless of the distances carried.

The Commission is also aware of the fact that the work actually performed in the transportation of freight, is the number of tons hauled one mile, and that the unit of measure is one ton hauled one mile.

It must impress the reader as strange that the Commission did not use the ton mileage and the average rate per ton per mile, instead of the number of tons and the average rate per ton.

In order to supply the information omitted in Senate Document No. 257, I have prepared the following statement showing the service rendered by the railroads, and the compensation received therefor, during the years ending June 30, 1899, 1900, 1901, 1902, and 1903:

Years.	Rate per Ton per Mile.	Tons one Mile.	Increase in Ton-Miles as compared with 1899.	Per Cent.	Earnings from Freight.	Increase in Earnings as compared with 1899.	Per Cent.	Increase in Earnings due to Increased Rate per Ton per Mile over 1899.	Per Cent.
1899	.724	123,667,257,153	.....	.....	$913,737,155	.....	.....	.....	.....
1900	.729	141,599,157,270	17,931,900,117	14.5	1,049,256,323	$135,519,168	14.8	$7,079,957	0.77
1901	.750	147,077,136,040	23,409,878,887	18.9	1,118,543,014	204,805,859	22.4	38,240,055	4.18
1902	.757	157,289,370,053	33,622,112,900	27.2	1,207,228,845	293,491,690	32.1	51,905,492	5.68
1903	.763	173,221,278,993	49,554,021,840	40.0	1,338,020,026	424,282,871	46.4	67,556,298	7.39
			124,517,913,744	100.6	$5,626,785,363	$1,058,099,588	115.7	$164,781,802	18.03

It will be seen that in 1900, the service rendered shows an increase of 14.5 per cent. over 1899, that the compensation increased 14.8 per cent., and that the increase due to increased rate per ton, per mile, was 0.77 per cent.

In 1901, the increase in service was 18.9 per cent., increase in revenue 22.4 per cent., and the increase in earnings due to increased rate was 4.18 per cent.

In 1902, the ton miles increased 27.2 per cent., the revenue increased 32.1 per cent., and the increase in earnings due to increased rate was 5.68 per cent.

In 1903, the tonnage increased 40 per cent., the revenue 46.4 per cent., and earnings due to increased rate, 7.39 per cent.

The statement also shows that the increase in earnings due to increased rate per ton, per mile, was..... $67,556,298
in 1903, instead of..... 155,475,502
as stated by the Auditor; and that the total increase during the four years ended June 30, 1903, was.....$164,781,802
instead of 302,059,897
as stated in Senate Document No. 257. So that the Auditor's statement is subject to a discount of at least 43 per cent. in favor of the railroads.

Of course comparisons based upon the average rate

per ton, per mile, are not conclusive as to either increase or decrease in rates on particular articles of freight. They are only approximately correct, because they are affected by the relative quantities of the different classes of freight carried, which are not the same in each year.

Senate Document No. 257 also gives an estimate of the effect of advances in rates on certain commodities such as hay, sugar, iron, steel, bituminous coal, lumber and other products of the forest, and showing a large increase in revenue derived from these advances. But in the absence of definite information, the Auditor has based his estimate upon assumptions as to the average advances per ton, and the amount of traffic to which they apply, that are not warranted by the facts. Hence, the results of the estimate are misleading.

Senate Document No. 257 bears the impress of hasty preparation and lack of necessary information. It is of no practical value. It has no rational bearing, and throws no light, upon the question of rate-making by the Government. Its interest is derived solely from the fact that it illustrates one of the methods that have been adopted to influence Congress and the public, in favor of legislation conferring the rate-making power upon the Commission.

The impartial observer, upon an examination of all the surrounding circumstances and conditions, must come to the conclusion that such advances as the railroads have made were fully justified by the increased cost of operation due to increased wages and increased prices of materials. Moreover, justice would seem to require that the railroads, after having made large reductions in these rates and sharing with the people the burden of hard times, should be allowed to participate in the benefits accruing from the general prosperity.

Senate Document No. 257 contains a summary show-

ing gross earnings, ratio of operating expenses to earnings, and mileage of the railways operated in the United States, for the years ending June 30, 1899, 1900, 1901 and 1902. A summary comparing these items with those of 1903 would have afforded much useful information to the Senate, in showing the effects of increased wages and increased prices of materials on the income of railroads. Unfortunately, the returns for 1903 were not complete when the Commission made its report. The following summary will supply the omission:—

	1899.	1903.	Increase.	Per Cent.
Gross earnings from operatien.....	$1,313,610,118	$1,900,846,907	$587,236,889	44.7
Per mile of line.....	7,005	9,258	2,253	32.1
Operating Expenses:				
Maintenance of structures.....	$180,410,806	$266,421,774	$86,010,968	47.7
Maintenance of equipment.....	150,919,249	240,429,742	89,510,493	59.3
Conducting transportation.....	486,159,607	702,509,818	216,350,211	44.5
General expenses.....	38,676,883	47,767,947	9,091,064	23.5
Unclassified.....	802,454	409,571*	392,883	48.8*
Total operating expense.....	$856,968,999	$1,257,538,852	$400,569,853	46.7
Per mile of line.....	4,570	6,125	1,555	34 0
Percentage of expenses to earnings.	65.24	66.16	.....	0.92
Miles operated, single track.....	187,534.68	207,977.22	20,442.54	10.9
Employees, number.....	928.924	1,312,537	383,613	41.3
Employees' compensation.....	522,967,896	757,321,415	234,353,519	44.8

It will be seen that while the gross earnings from operation increased 44.7 per cent., the operating expenses in 1903 as compared with 1899 increased 46.7 per cent., and the compensation of employees increased 44.8 per cent.

EFFECTS OF RATE-MAKING BY THE GOVERNMENT.

That the interests of the people and of the railroads are identical, has become proverbial. This mutuality has been recognized from the earliest days of railroads to the

* Decrease.

present time: and the co-operation of the people and the railroads has been fruitful of the most beneficent results. It may be said that the two are in partnership in the work of developing the resources of this country.

The proposed intrusion of a Government rate-making bureau as a third party, one that has no adequate knowledge of the business and no responsibility for results, naturally excites serious apprehension.

We have seen that such a bureau would be unable to do the work that is now performed by hundreds of trained railroad men who are in close touch with the shippers, and who know and can promptly meet their needs and requirements. It remains for us to inquire: what would be the effects if the adjustment of rates were taken out of the hands of these traffic officials, and transferred to a Government bureau?

The thoughtful reader who has given careful consideration to the facts and circumstances bearing upon the adjustment of rates, that were developed in the course of this inquiry, will regard as self-evident, the following propositions:—

I.

GOVERNMENT RATE-MAKING HAS A TENDENCY TO OBSTRUCT COMMERCE.

Amongst the characteristics of Americans are: their practical common sense, their versatility, and powers of adaptation, their ability to deal promptly and efficiently with new conditions and exigencies in applying the most direct and suitable means to the desired ends, and the energy and perseverance with which their objects are pursued.

And in no department have these qualities had a bet-

ter and wider field for exercise, than in the construction and operation of the railroads of this country. This is particularly true of the operation of the traffic departments of the railroads.

One of the most important factors that has contributed to the usefulness of the railroads to the people, is the flexibility of the tariffs,—their adaptability to the changing commercial conditions. It is obvious that if the adjustment of rates is taken out of the hands of the traffic officials and transferred to a rate-making bureau in Washington, this flexibility would be destroyed; it would give place to rigidity. The bureau could not fix maximum rates, leaving the railroads some margins for their adjustment. It would have to fix absolute rates: and these rates, when fixed, could not be changed except with the consent of the bureau.

In vain would the shipper apply to the traffic men for a rate that might enable him to send his commodities to certain markets. The officials could no longer afford the desired assistance, however anxious they might be to do so. Hence, the shippers would have to apply to the bureau in Washington. But that bureau would have to investigate the case before it could render its decision. Experience has shown that these investigations consume considerable time; and as the Commission would always have a large number of cases before it, shippers would in most cases get a decision only after the opportunity for making the shipment had passed. It is safe to predict that it would not be long after the bureau had commenced rate-making, that this unfortunate condition would prevail in large sections of the country; and it is no exaggeration to say that the commerce of the country would become seriously obstructed, so far as it is dependent upon railroad transportation.

II.

GOVERNMENT RATE-MAKING HAS A TENDENCY TO ENCOURAGE REBATING.

The inability of the bureau to act promptly upon application for relief, would render the situation so intolerable that great pressure would be brought to bear upon the traffic officials to induce them to anticipate a decision of the bureau favorable to the applicants; and if the officials should yield to this pressure, as they might, there would be a revival of the pernicious practice of paying rebates. There is no escape from the conclusion that unwise legislation has a tendency to produce the very evils it is designed to cure.

III.

GOVERNMENT RATE-MAKING WOULD HAVE THE EFFECT OF CONGESTING THE COURTS WITH INNUMERABLE INTERSTATE COMMERCE CASES.

It is one of the objections that have been made to the operation of the Act to Regulate Commerce, that there is great delay in reaching final decisions in the cases that are appealed to the courts. In order to cure this defect, the Townsend Bill provides for the establishment of a special court of record, to be called the court of transportation, which would have exclusive jurisdiction over suits and proceedings arising under the Act to Regulate Commerce, etc.; and in order to expedite work, the President is authorized to appoint five additional circuit judges.

We have seen that comparatively few cases have come before the courts since the enactment of the Act to Regulate Commerce. If, however, a Government bureau

should fix rates, the number of cases would naturally increase very largely; for it must be expected that a bureau in Washington, being unfamiliar with local conditions that affect rates, will make many mistakes that would result in numerous appeals to the court of transportation, and that the delays complained of, instead of being diminished, would largely increase.

It should be borne in mind that mistakes made by traffic officers can be promptly corrected by themselves as soon as they are made aware of their injurious effects. This could not be done in cases of mistakes or wrong decisions made by the bureau.

IV.

RATE-MAKING BY THE GOVERNMENT WOULD PRODUCE UNJUST DISCRIMINATION AGAINST LOCALITIES, AND SUBJECT THE INSTRUMENTS OF COMMERCE, AS WELL AS COMMERCE ITSELF, TO THE CONTROL OF AN AUTOCRATIC GOVERNMENT BUREAU.

The effects of rate-making by the Government which have thus far been pointed out, mainly concern persons, companies, firms and corporations. We will now consider how localities and business communities would be affected by attempts to fix the relations of rates, and what are known as differentials.

In considering the question of discrimination against localities, it was pointed out that complaints of discrimination against localities result mainly from commercial rivalry between business communities, the railroads taking sides with the communities they respectively serve. It was stated that these complaints will continue so long as commercial rivalry exists between such communities.

It is obviously not desirable that such rivalry should ever cease.

We also pointed out that the struggles of the railroads, and their frequent rate-wars for the purpose of gaining some advantage for their patrons, generally ended in compromises or agreements by arbitration, which in the course of years brought about an adjustment of rates; so that now the rates throughout the country may be regarded as being in a state of equilibrium.

And we referred to the opinion expressed by Interstate Commerce Commissioner W. G. Veazey, that it is idle to look forward to an equalization of rates that can be applied to all localities,—that such equality is unattainable through human endeavor, and that even common control of all railways through consolidated ownership or government purchase, could not accomplish such a task,—that any attempt to effect such equalization would have the opposite effect, and inflict greater discriminations than arise under the existing general practice of fixing charges which attract traffic to the various lines.

It is safe to say that these considerations would not deter the Commission from undertaking the task of readjustment. In fact, it would be compelled to take action on the numerous applications that would doubtless be made by the organizations and their members, who have for several years appeared before Congressional committees through their representatives, asking that the powers of the Commission be enlarged.*

It is a remarkable feature of the campaign that these organizations should have been led to believe that a rate-making bureau in Washington can do what the railroads,

* It appears from the testimony before the House Committee on Interstate Commerce that the associations which were formed for the purpose of securing additional legislation had by January, 1905, grown to embrace a membership of 480 commercial, manufacturing and agricultural organizations, represented by their energetic President, E. P. Bacon.

whose interests are identical with their own, have in all these years, and notwithstanding their strenuous efforts, failed to accomplish; that is, to adjust the relative rates throughout the country to the entire satisfaction of all the parties in interest. However, this faith in the Commission appears to be justified at least by its good intentions; for there can be no doubt that it has been and is ready and anxious to undertake the task. It has called the attention of Congress and of the public to the importance of "giving each community the rightful benefits of location, and to keep the different commodities on an equal footing." In its annual report for 1904 it expresses the opinion that discrimination between localities or classes of traffic "can be redressed only by the exercise of sufficient authority to readjust rate schedules to be observed in the future on the basis of *relative justice.*"*

The question arises: what principles are to be applied by the Commission to the readjustment of existing rates, so that each locality shall enjoy the "rightful benefits of location," and that the requirements of "relative justice" be satisfied? Would it be the equal mileage basis? Over thirty years ago, that basis was found to be false in theory and impracticable of application to tariffs on interstate traffic. Hence this crude method of rate adjustment has generally been confined to some of the tariffs on intra-State traffic established by State railroad commissioners. It is interesting to note, however, that in the early '90's the equal mileage basis seems to have found favor with the Interstate Commerce Commission; for in the Maximum Rate cases it ordered reductions in the rates from Cincinnati to Southern points amounting to from 2 to 48 per cent. of the then existing rates, on about 2,700 articles of freight, upon the ground that *on a mileage basis* those rates were higher than the rates from New York and

* Italics are mine.

other Northern cities,—not by the same roads, however, but by different and independent systems of transportation starting from different initial points, and passing through territories widely separated, to common destinations.

Rate-making by the Government would inevitably result in mileage tariffs; and while the application of the equal mileage basis to interstate tariffs would doubtless greatly simplify rate-making, and if acquiesced in by shippers, would stop all complaints of unjust discrimination against localities, it would also put a stop to most of the railroad traffic in this country, other than that between the local stations of railroads.

But whatever theory of rate-making the Commission might adopt, it is obvious that, owing to the interdependence of rates, any one adjustment applying to an important business center would necessitate corresponding adjustments of a number of other rates from other localities: and as the Commission cannot act promptly, every adjustment would create unjust discrimination against a number of business communities. This evil would be bound to grow and spread over the whole country, so that a general demoralization and a chaotic state of the business would become inevitable.

This is not overdrawn. It is not even complete;—for the railroads, as well as the business communities which would be seriously injured by these discriminations, would naturally endeavor to obtain relief in the courts, so that in numerous cases, rates would be finally established at the end of a lawsuit. And when changes in commercial conditions required a change in the rates established by the Commission, it might again become necessary to resort to a lawsuit in order to effect another adjustment. This method of rate-making has been aptly

termed "political rate-fixing and business by lawsuit."* This sentence correctly describes and justly condemns rate-making by the Government.

It is a matter of surprise that the organizations above referred to, should ask Congress to confer upon the Commission, powers, the exercise of which must be so injurious to their interests.

As already pointed out, the explanation is to be found in the fact that general rate-making power has been presented in the innocent guise of rate revision. Any one who is at all familiar with the business of railroad transportation can easily see through this thin disguise. As a matter of fact, the powers which it is sought to confer upon the Commission are enormous. They are far greater than any authority ever exercised by any man or set of men in this country, or in the whole world.

A rate-making commission would have absolute control over the entire commerce of the country that is dependent upon railroad transportation. It could apportion the traffic among business communities, determining the quantity and character of business each community should be allowed to transact, and designate the markets to which it should be allowed to send its commodities. Such a commission would also have control over the operation of the railroads, and fix the amount of income each company should be allowed to earn. This may be regarded as an exaggeration; for it might be said: "Will not the courts of the country afford protection to these properties?" We shall see in the course of this inquiry, that under the proposed legislation, the hope for protection of the owners of railroads is illusive, and that this is also true in respect to business communities.

* An address before the Boston Economic Club upon March 10, 1905, by David Willcox.

PORT DIFFERENTIALS.

It is true that the Constitution of the United States provides (Article I, Section IX, Paragraph 6) that "No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." But how, for example, would it be possible for a rate-making commission to arrive at a just decision of the question: what shall be the relative rates between common points of shipment in the West to Atlantic Coast ports?—a question involving what are known as port differentials, which, after repeated rate-wars, agreements, and arbitrations, still remains unsolved, and is probably insolvable, the ingenuity of man having so far failed to discover an equitable basis for the establishment of such differentials?

A brief history of the efforts that have been made during the last thirty-five years to settle this question, affords a good illustration of the great difficulties that are encountered in the adjustment of relative rates of localities.

By an agreement made in 1869, Baltimore was allowed a differential on grain of 10c. per 100 pounds as against New York. After a war of rates it was reduced to 5 cents in 1870, and this differential remained in effect until 1876 on grain and the lower classes of freight, the difference on the 1st, 2d and 3d classes remaining at 10 cents per 100 pounds. On westbound freight the difference in favor of Baltimore and Philadelphia in 1875 was as follows:—

	Classes.				
	1	2	3	4	Special.
From Baltimore	10	9	8	6	5
From Philadelphia	7	7	6	4	3

PORT DIFFERENTIALS.

In March, 1876, the fixed differential on eastbound freight was abandoned, and the rates were made on a percentage basis from Chicago to Baltimore of 13 per cent., and to Philadelphia 10 per cent., less than to New York.

This continued in effect only a few weeks, the New York Central and Erie Roads claiming that it gave too great an advantage to Philadelphia and Baltimore: whereupon a war of rates ensued, which continued until 1877, when the agreement of April 5, 1877, went into effect. It will be seen from the copy of this agreement, already given in this inquiry under the head of "Trunk Line Association," that the percentages based upon relative distances from common shipping points were replaced by fixed differences. On eastbound freight, the rates from all points west to Baltimore were 3 cents, and to Philadelphia 2 cents, lower than to New York. On westbound freight the rates from Baltimore and Philadelphia were less on the different classes, as follows:—

	Classes.			
	1	2	3	4
From Baltimore	8	8	3	3
From Philadelphia	6	6	2	2

The object of this agreement was the equalization of the aggregate cost of rail and ocean transportation between competing points in the West, and all domestic and foreign ports reached through Baltimore, Philadelphia, and New York.

This agreement proved unsatisfactory to the New York railroads, which claimed that since 1877, the ocean rates upon which these differentials were based for the

purpose of equalizing shipments, had been materially reduced from Philadelphia and Baltimore, and were nearly the same as those from New York,—giving the southern ports an advantage over New York on export freight. As the agreement provided for its modification on three months' notice of either party, the New York Central, in June, 1880, gave the required notice.

Thereupon the rate situation again became demoralized, and the question of differentials was referred to Commissioner Albert Fink, who, in December, 1881, made an elaborate report which covers every phase of the subject, showing the elements that enter into the adjustment, and the effect of the methods that had been adopted. In his conclusions he says:—

"From this view of the case it would seem that too much stress has been laid upon the necessity of a nice adjustment of inland rates, from the operation of which it is expected that each of the railroads and each of the cities should get exactly that proportion of the competitive traffic to which it may consider itself entitled. This expectation is entertained in the face of the fact that differential rates heretofore have never been observed whenever they came in conflict with the more legitimate conditions of competition; and there is not the least prospect that they will ever be maintained, nor ought they to be, if they operate unjustly toward any of the railroads or communities affected by them.

"Relying, in a great measure, upon the ocean rates to adapt themselves to the inland rates, and bearing in mind that the distribution of traffic between the trunk lines and cities is controlled by other conditions than mere agreements as to rates, a fact that is well established by the constancy with which the traffic divides itself, regardless of transportation rates, the true plan evidently is, to agree upon a proper distribution of that traffic at its source, if possible, and then to allow it to flow to the different cities according to the natural laws of trade. The rates should be sufficiently flexible, and might be changed from time to

time, so as to secure to the competing lines the agreed amount of traffic based upon the distribution of traffic as it took place under free competition. This is a much more direct and practical way of securing justice to each road, than to attempt to predetermine and enforce rates, under the impression that this could bring about a satisfactory division of traffic."

The recommendation of Commissioner Fink, however, failed to settle the controversy; and in the spring of 1882, the whole subject was referred to the arbitration of Senators Thurman and Washburn, and Judge Cooley. This Board, known as the Advisory Commission, reported, July, 1882, stating in substance that Baltimore and Philadelphia rates should be lower than New York rates, and that the results of actual competition for several years afforded the best measure of these differentials. They therefore recommended that the then existing differentials be continued "for the present."

Accordingly, these differentials were used in the published tariffs of the railroads, but without being generally observed in actual practice; nor was any further attempt made to change them officially.

In 1897 the question came before the Interstate Commerce Commission, the New York Produce Exchange having filed a petition against the Baltimore and Ohio and other lines, charging that the differentials resulted in undue discrimination against New York.

The Commission held, April 30, 1898, that the differentials are legitimately based upon the competitive relations of the carriers—that it does not appear upon the present record that the carriers have exceeded the limit within which they are free to determine for themselves, and, accordingly, that the differentials complained of do not result in unlawful preference or advantage to Philadelphia or Baltimore over the City of New York.

PORT DIFFERENTIALS.

The differentials here referred to were the same as those in effect in 1882; viz.: on grain, flour and provisions from Chicago and other Western points, 2 cents per 100 pounds to Philadelphia, and 3 cents per 100 pounds to Baltimore, below the rate to New York.

Owing to severe competition, particularly with the railroads serving the Gulf ports, the rates on grain were reduced to such low figures in 1899 that the roads of the North Atlantic ports agreed to reduce the differentials on export grain one-half.

The rates in effect May 10, 1899, from Chicago and the Mississippi river to Eastern seaboard cities, were, per 100 pounds:—

To New York	12	cents.
Boston	12	"
Philadelphia	11	"
Baltimore	10½	"
Norfolk	10½	"
Newport News	10½	"
Montreal	11	"
Portland	12	"

And to the Gulf ports: from Kansas City to Galveston, 10 cents, and New Orleans, 10 cents.

In the early part of 1904, a rate-war broke out between the lines leading from Buffalo to Baltimore, Philadelphia, New York and Boston, which resulted in the reduction of the rate on wheat from Buffalo to these ports, to 2 mills per bushel: and certain commercial organizations of Boston, New York, Philadelphia and Baltimore petitioned the Commission, asking that it examine the whole subject of differential rates, and determine whether the present differentials should be abolished, or if retained, modified.

Upon negotiations between these organizations and the representatives of the railroads, it was agreed to submit the question of differentials to the Interstate Com-

merce Commission, acting as a Board of Arbitrators. Proceedings of inquiry were instituted April 11, 1904, and hearings were held at New York, Philadelphia and Washington. April 27, 1905, the Commission decided (Commissioner Clements dissenting):

"We have not considered westbound differentials applicable to import traffic, since there are no facts in this record upon which to base an opinion. With respect to export differentials, we conclude that the differential on flour, both all-rail and lake-and-rail, should be 2 cents per 100 pounds at Baltimore and 1 cent per 100 pounds at Philadelphia; that there should be allowed both Baltimore and Philadelphia a differential of three-tenths of one cent per bushel on ex-lake grain; that otherwise the present differentials should remain in force."

The opinion of the Commission and its conclusion leave the question: what is a proper basis for the adjustment of port differentials? where the Advisory Board left it in 1882, and which had said in substance:—"We do not know what the basis should be. Continue the existing differentials, and if they do not result in a division of traffic satisfactory to the business communities and to the railroads, try some other differentials."

Of course these differentials involve agreements between the railroads; for differentials have no meaning and no effect unless the rates to which they apply are established and maintained by agreement,—which the antitrust law prohibits. And this leads Commissioner Clements to comment upon the conclusion of the Commission as follows:—

"While the situation justified the inquiry, the facts disclosed do not, in my judgment, justify the conclusions reached, for the reason that I believe they do violence to the great principle of competition which the Congress and the Supreme Court have so jealously and consistently nourished as one of the fundamental rights of the public.

In declaring as between competing lines and competing ports what differentials shall govern, assuming that they will govern, we hamper competition, and by this regulation of distribution effect in reality a division of territory, a division of traffic, and a division of earnings, which in substance and effect tend to defeat not only the purposes of the Antitrust Act against the restraint of trade, but the pooling provision of the Interstate Commerce Act, with the enforcement of which the Commission is charged."

What the Commissioner says about the defeat of the provisions of the Antitrust Act is doubtless true; but he is mistaken in regard to the defeat of the Act to Regulate Commerce, "with the enforcement of which the Commission is charged." The fifth or antipooling section of that Act does not prohibit a division of traffic brought about by an adjustment of rates. It only prohibits so-called money pools. As a matter of fact it is the Antitrust or Sherman Act that defeats the main purposes of the Act to Regulate Commerce; and the conclusion of the majority as well as the criticism of the dissenting member of the Commission, emphasizes the necessity we have pointed out of amending the law so as to permit railroad men to meet and agree upon reasonable rates of freight.

We have seen that excessive competition produces most of the evils which the regulation of railroads is designed to cure; and it is difficult to understand why the conclusion of the Commission in this case should "do violence to the great principle of competition which the Congress and the Supreme Court have so jealously and consistently nourished as one of the fundamental rights of the public." Free competition is doubtless the policy of Congress; but has the *Supreme Court* made it the principle of the law? Is it true that free competition is in need of the fostering care and nourishment of Congress and the courts? Have we not rather too much of it for the good of the people and of the railroads?

We have treated this subject somewhat at length, for the purpose of showing that it would be impossible for a Government bureau to fix rates between points in the United States, without giving preference to one or more of the ports of one State over those of another State, and that an attempt to exercise the autocratic rate-making power would result in unjust discrimination against localities, in demoralization of commercial conditions, and injustice to the owners of railroads, as well as to their patrons. It is obvious that while a railroad that serves a single port of a State can give such port preference over ports of other States, a Government commission could not adjust rates to and from all the ports of the different States, without violating Article I, Section IX, Paragraph 6, of the Constitution of the United States. And it should be borne in mind that the number of such ports has largely increased. There are now about 350 ports of entry and delivery established by law in this country.

GOVERNMENT RATE-MAKING WOULD NECESSITATE MAKING WATER ROUTES SUBJECT TO THE PROVISIONS OF THE ACT TO REGULATE COMMERCE.

The Congress has wisely left water routes, the great regulators of railway rates, untrammeled by legislation. They are subject to the Act to Regulate Commerce only when in connection with railroads, they form through transportation lines. When a Government bureau undertakes to make the rates in this country, it will be absolutely necessary to give it jurisdiction over freight rates of water routes, whether they form parts of through lines or not.

RATE-MAKING BY THE GOVERNMENT WOULD BE UNJUST TO THE RAILROADS, AND INJURIOUS TO THE PUBLIC.

It is well known that the sole value of railroads to their owners, consists in their capacity to earn a fair return on the capital invested in them, and that a railroad's earning capacity depends in a measure upon the efficient and judicious management of the properties. It is manifest that to take the vital function of making rates and regulations out of the hands of the owners, is equivalent to taking the properties themselves. If the control of railroads by the Government is essential to the public welfare, justice would seem to require that it be obtained through the purchase of these properties. This, however, is not contemplated. It is proposed to acquire substantial control under the commerce clause of the Constitution. That this clause is sufficiently broad and elastic for that purpose may no longer be doubted. It is certain that the rate-making bureau might, in the course of time, render most of the properties of little value to their owners; for the amount of their income would be absolutely under its control. Legislation so false in principle would necessarily produce disastrous consequences in practice. The injustice and injury would not be confined to the owners of railroads, but would be shared by the general public—the commercial and industrial communities.

One of the remarkable features of the scheme is that it would be necessary to change existing legal procedure in order to carry the scheme into effect. For example:—the proposed bills for enlarging the powers of the Commission afford no redress to the owners of railroads in cases where the Commission orders a reduction of rates which a court on appeal declares to have been wrongfully

made,—because the reduced rates take effect of their own force at once; so that, pending the decision of the courts, the railroads may have to suffer heavy losses. Under this peculiar procedure, a corporation is presumed to be guilty until it proves itself innocent; and punishment is inflicted upon it before it has had its day in court.

In view of the great additional work that rate-making would impose upon the Commission, it is reasonable to suppose that it would commit numerous errors in deciding cases that came before it. We have seen that in the past, out of 47 cases that came to the courts upon appeal since 1887, the Commission was sustained in only 11 cases. Many of the cases that would be the subject of litigation under the exercise of the rate-making power, would doubtless involve large amounts of money. It appeared from the testimony before the House Committee on Interstate Commerce, that the annual losses to the railroads by the order of the Commission in the Maximum Rate cases, would have amounted to about $3,000,000.

In the case known as the Danville case, it was shown by proof that obedience to the order of the Commission would have resulted in a loss to the Southern Railway Company of $544,174 per annum.

In giving this example of the effect of the novel procedure, it has been assumed, for the sake of illustration, that under the proposed legislation, it would be in the power of the courts to reverse any erroneous decisions of the Commission. But this assumption is erroneous; for it is another remarkable feature of the rate-making scheme that the courts would not review the decisions of the Commission, except in cases where its reductions of rates had been so great as to be confiscatory.

Eminent lawyers are of the opinion that, the Supreme Court having declared that the power to make future

rates is a legislative power, Congress cannot constitutionally confer upon the judicial department, any power to review or reverse the action of the Commission in making future rates, and that the only power which would be left to the judiciary, or that could be imposed upon it by Congress, would be the power to decide whether the rates are confiscatory in character. If this opinion is correct, it is obvious that any provision for an appeal from the decision of the Commission, while ostensibly for the protection of the property rights of the owners of railroads, would be a mockery of justice, and that the proposed scheme of rate-making by the Government would be pure despotism untempered by law.

This is not in keeping with the methods practiced in civil as well as in criminal courts. Should not the owners of railroads enjoy the equal protection of the country's laws? Why should an exception be made against them? Why should our system of judicial procedure be subverted, in order to cure an evil which can be eradicated otherwise by process of existing law, and without doing an even greater wrong?

An eminent lawyer, commenting upon the proposition that the orders of the Commission take effect at once, uses the following language:—

"It seems to me preposterous to claim that the orders of the Commission should have the force and effect of a judgment, or decree.

"You may ascribe to the Commission as much ability, and as much integrity, as can be claimed for any one; and yet when we remember that the regulation of interstate railway rates is in its infancy, and that erroneous orders made by the Commission in regard to rates may be ruinous in their results, no order of the Commission fixing rates should be enforced, until after a party who is to be injuriously affected has had an opportunity to be heard in court.

GOVERNMENT RATE-MAKING WOULD DEPRIVE RAILROAD PROPERTIES OF THE EQUAL PROTECTION OF THE LAW.

"The ultimate question as to what is an unreasonable, discriminatory, or preferential rate, while largely dependent upon probatory facts, is necessarily one of mixed law and fact; and upon the question of law involved in every such inquiry, the parties are entitled to the judgment of the court, before they are compelled to obey orders which may result in the loss of hundreds of thousands of dollars per annum in a single case.

"In the case of the *K. & I. Bridge Co. vs. L. & N. R. R. Co.*, 37 Fed. Rep., 567, it was held by Judge Jackson that the Interstate Commerce Commission is to be regarded as the general referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties and obligations conferred and imposed by the Act to Regulate Commerce. How would the legal profession of the United States regard *a law requiring parties against whom a referee in chancery may make a report, to obey the orders of the referee in advance of any hearing before the Chancellors?* And yet that is exactly what the Interstate Commerce Commission desires shall be enacted, in regard to orders which it, as referee, may make in fixing rates.

"When we remember that the Act approved Feby. 11, 1903, entitled 'An Act to expedite the hearing and determination of suits in equity,' etc., very materially expedites litigation instituted by the Commission to enforce its orders, Congress ought not to go further and require that orders of the Commission fixing rates be obeyed, before their legality can be tested in court."

The Commission understands clearly that under the bills that were introduced in Congress conferring rate-making powers upon the Commission, appeals from its decisions to the courts would be ineffectual.

Chairman Knapp went before the Senate Committee on Interstate Commerce in 1898, and said:—

"The determination of what that rate shall be in the future is a legislative administrative question with which the courts can have nothing to do. * * * This Commission, for the purposes we are now discussing, repre-

sents the Congress of the United States, and when it has made an order, in a certain sense, it is like an act of Congress."

Mr. Prouty, when before the same Committee on February 20, 1900, said:—

"The prescribing of a rate is, under the decisions of the Supreme Court, a legislative, not a judicial, function, and *for that reason, the courts could not, even if Congress so elected, be invested with that authority.*"

An eminent lawyer who, for many years, has acted as counsel in numerous cases arising under the Act to Regulate Commerce, in commenting upon the above, says:—

"Mr. Knapp and Mr. Prouty both take the same view of the question that I do, and it may be confidently predicted that the Commission will insist upon that construction if this bill should be passed by Congress.

"If the fixing of a future rate is a legislative act, and is to have the same effect as though Congress itself prescribed it in an act of Congress, the power which the printed bill assumes to give to the court to determine whether the order of the Commission fixing such rate is made upon some error of law, or is upon the facts unjust and unreasonable, is a power which Congress could not exercise, because no court can determine whether an act of Congress is upon the facts unjust or unreasonable, or whether an act has been passed under some error of law."

"It is true that many of the States have vested State railroad commissions with legislative power to make rates, and so long as those rates are not confiscatory in their character, the Federal courts have held that they can grant no relief; but Congress has wisely refused to vest any such power in the Interstate Commerce Commission. It is an arbitrary and irresponsible power, whether vested in a State or National Commission. However unfair or unjust the action of the Interstate Commerce Commission may be, it will, if the Commission be vested with the legislative power to fix rates, be practically irre-

sponsible, because in that event it will be claimed that the courts will have no jurisdiction to review the action of the Commission, unless the rates so fixed be absolutely confiscatory, or it can be affirmatively shown that the Commission acted corruptly."

This matter was also made clear by Victor Morawetz in his testimony before the Senate Committee on Interstate Commerce, April, 1905. He says:—

"I am trying to make the point, and to impress it upon the Committee, that no statute can be drawn which will require the courts to reconsider the case before the Commission in fixing rates, to hear the case *de novo,* and to substitute the ideas of the court as to what is a wise or desirable rate, for the ideas of the Commission."

In an article published in the *Harvard Law Review* for June, 1905, Victor Morawetz says:

"If Congress cannot give to the courts original power to prescribe what rates the railway companies shall charge, Congress cannot require the courts to reconsider the whole case as it was considered by the Commission, and to pass upon the wisdom and policy of the action of the Commission in fixing a rate. In other words, Congress cannot constitute the courts, in substance, an Appellate Railroad Commission, and require them to substitute their own ideas as to the wisdom and policy of a rate, for the ideas of the Commission. Any statute authorizing the Commission in the first instance to exercise purely discretionary power in fixing rates and requiring the courts, upon a review of the action of the Commission, to exercise the same discretion as the Commission, would be unconstitutional, because this discretion would be a legislative and not a legal discretion. Such a statute would, in effect, constitute the courts the ultimate rate-makers for the railways in the United States.

"The courts undoubtedly can pass upon the question whether a rate is unreasonably high and therefore unlawful, or whether it is in violation of a legal order made

by the Commission. The courts also can pass upon the question whether the action of the Commission in fixing a rate is unconstitutional; that is to say, whether it would in effect amount to confiscation of the property of the carrier; but the courts cannot be required to substitute their own ideas of wisdom or policy for those of the Commission in fixing a rate which is neither confiscatory nor unreasonably high. The question in such a case would not be a question of fact nor a question of law. The adjustment of the rates of a carrier between these extremes presents merely a question of business policy largely dependent upon individual opinion and preference. The carrier can pass upon this question; and Congress, in the exercise of its legislative functions, can pass upon it. Possibly a commission appointed by Congress can be empowered to pass upon such a question. But the courts of the United States cannot be required to pass upon such questions and in effect take charge of the traffic management of the railways. * * * Under the bills that have been introduced in Congress, the only question that could be considered upon an appeal by a railway company would be whether the rate prescribed by the Commission was confiscatory, and *the only question that could be considered upon an appeal by a shipper would be whether the rate prescribed by the Commission was extortionate or discriminatory. If a locality should be aggrieved by the action of the Commission, it would probably not have any redress whatsoever.*"*

RATE-MAKING BY THE GOVERNMENT WOULD INJURIOUSLY AFFECT THE VALUES OF RAILROAD SECURITIES, IMPAIR THE CREDIT OF RAILROAD COMPANIES, AND THE EFFICIENCY OF THEIR SERVICES TO THE PUBLIC.

It is obvious that investors would look with suspicion upon securities, the value of which depends upon a rate-making bureau that has the power to say what income

* Italics are mine.

these securities shall yield. Some idea of the enormous power such a bureau would exercise over property can be formed by referring to the Report of Statistics of Railways in the United States for 1903, which shows that on June 30th of that year, there were outstanding in railroad stocks, $6,155,559,032; and that the total funded debt was $6,444,431,226, a total of $12,599,990,258.

It appears from the testimony of Daniel Davenport before the Senate Committee on Interstate Commerce, that in the six States of New York, New Jersey, New Hampshire, Massachusetts, Connecticut and Maine, savings banks held railroad stocks and bonds of the value of $442,354,086, or 20.31 per cent. of their entire deposits. There were in those banks, 5,174,718 depositors; and the total deposits amounted to $2,177,859,256. Of course these depositors are all interested in the prosperity of the country's railroads.

It is well known that railroad companies always need additional capital to enlarge their facilities. The question arises: who will buy their securities when their value is made dependent upon the acts of a Government bureau? Being unable to borrow money, the railroads would necessarily have to reduce their service to the public.

RATE-MAKING BY THE GOVERNMENT HAS A TENDENCY TO PRODUCE LABOR STRIKES.

That the power to fix rates would be exercised in reducing rates, is obvious; for that is the object its advocates wish to attain. Nor can it be doubted that a rate-making bureau would endeavor to meet their wishes.

An examination of the Income Account of the railroads, published with the Report of the Interstate Commerce Commission for the year ending June 30, 1903, will show that a small reduction in the average earnings per

ton, per mile, would deprive the railroads of the ability to pay their stockholders reasonable dividends. They would therefore be forced to cut down their operating expenses, and especially the wages of their employees; but labor in this country is too well organized to submit without a struggle to such reductions; hence labor strikes, with the attendant demoralization of the railway transportation system and the commerce of the country would become inevitable.

POLITICAL EFFECTS OF RATE-MAKING BY THE GOVERNMENT.

The political questions involved in rate-making by the Government are of a serious character, but do not come within the scope of this inquiry.

THE MAXIMUM RATE CASES.

An Object Lesson in Rate-Making by the Government.

The Question: How would a rate-making commission exercise its powers? is one of great interest to the owners of railroads, as well as to the public. If we may judge by some of the decisions of the Interstate Commerce Commission, made during the time it supposed the Act to Regulate Commerce conferred the rate-making power upon it, we have no reason to suppose that its action would be conservative.

The opinion and decision of the Commission in the cases of *The Freight Bureau of the Cincinnati Chamber of Commerce vs. The Cincinnati, New Orleans and Texas Pacific Railway Company et al.,* and of *The Chicago Freight Bureau vs. Louisville, New Albany and Chicago Railroad Company et al.,* 167 U. S. Repts., 479, known as the Maximum Rate cases, afford the best object lesson of the destructive effects of rate-making by the Government.

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

The general ground of the complaint in the Cincinnati case was that rates of freight established by the defendant carriers from the Eastern seaboard and Central territories respectively, to Southern territory, unjustly discriminated in favor of the merchants and manufacturers whose business is located and transacted in Cincinnati, and other points in Central territory.

In the Cincinnati case the reasonableness of the rates in and of themselves was not questioned. The burden of the complaint was against the relation which exists between the current rates of freight on manufactured articles (the numbered classes) from Eastern seaboard territory to Southern territory, and the current rates of freight existing on like commodities when shipped from the Central territory to the South; and also against the unfair basis of general construction of the tariffs whereby the rates charged for the transportation of commodities classified under the numbered classes, bore a much higher percentage relation to the rates from New York, than to the rates on commodities enumerated under the lettered classes (food products, and some heavy articles of traffic).

In the Chicago case the complaint was the same as in the Cincinnati case; but in addition, the reasonableness in and of themselves, of the through rates from Chicago to Southern territory was questioned, upon the ground that the traffic between Chicago and Southern territory is through traffic, and that it was unjust to Chicago that rates from that point should be exacted by defendants, based upon unreasonably high rates between Cincinnati and other Ohio River crossings, and Southern territory, to which are added substantially local rates in effect from Chicago to Cincinnati, and such other Ohio River crossings.

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

The following is the final Conclusion and Decision of the Commission:

"Our conclusion upon the whole is that, as charged in the complaint in the Chicago case, the rates on the numbered classes from Cincinnati and the Ohio river crossings to the South are 'unreasonably high,' and as they enter into the through rates from Chicago, that those through rates, as well as the rates from Cincinnati, are excessive. There is no complaint that the rates from Chicago to Cincinnati and the other crossings are unreasonable in themselves, and no evidence authorizing us to so find. They are the regular Trunk Line rates and are *not* subject to the objection, as in the case of the Association rates south of the river, that they are made higher than they otherwise would be for the purpose of securing to the Eastern Seaboard lines traffic from territory set apart to them. The cost on freight in general, per ton per mile, on the roads south of the river, appears to have been, for the years named, in the tables heretofore given, about 25 per cent. on an average greater than the cost per ton per mile on the roads from Chicago to the river. The tonnage of the latter roads is also greater than that of the former, as shown in the tables. Rates from Cincinnati to Southern territory from 35 to 50 per cent. higher per ton per mile than those from Chicago to Cincinnati, and other Ohio river crossings, will, in our opinion, make full allowance for these differences in cost and tonnage, and be at least not unreasonably low, as maximum rates. The rates in cents per 100 pounds, given below, are approximately upon this basis:

FROM CINCINNATI.

To	1	2	3	4	5	6
Knoxville	53	45	37	27	22	20
Chattanooga	60	54	40	30	24	22
Rome	75	64	54	44	34	24
Atlanta	86	73	60	45	35	27
Meridian	114	98	80	62	49	38
Birmingham	87	74	60	46	36	28
Anniston	86	73	60	45	35	27
Selma	108	92	78	60	48	36

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

"Rates from Chicago to Knoxville, Chattanooga Rome, Atlanta and Anniston are made *via* Cincinnati; those from Chicago to Birmingham and Selma, *via* Louisville; and those from Chicago to Meridian, *via* Cairo, on the Illinois Central. The rates in the following table accordingly, to the five cities first named, are combinations of the above rates to those cities with the existing rates from Chicago to Cincinnati; to the two cities next named, they are combinations of rates from Louisville, constructed on the same basis as the rates in the above table with the existing rates from Chicago to the river; and to Meridian, they are combinations of rates from Cairo, constructed on the same basis as rates in the above table with the existing rates from Chicago to Cairo.

	From Chicago					
To	1	2	3	4	5	6
Knoxville	93	79	62	44	37	32
Chattanooga	100	88	65	47	39	34
Rome	114	97	79	61	49	38
Atlanta	126	107	85	62	50	39
Meridian	114	98	82	60	47	38
Birmingham	111	95	72	52	44	34
Anniston	126	107	85	62	50	39
Selma	128	112	89	66	53	38

Note.—The rates from Chicago and Cincinnati to Meridian are made substantially the same, because the larger portion of the haul from Chicago is in Central Territory, where rates are lower.

The conclusions of the Commission in these cases afford a good illustration of the far-reaching, bad effects of false theories applied to the adjustment of railway freight rates.

The Commission was evidently strongly influenced by the equal mileage theory when it made this decision,—a theory which had been abandoned as unsound and impracticable about a quarter of a century before that time. But while the theory was old and obsolete, the application of it made by the Commission in this case was novel.

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

When the reasonableness of the relative rates of different localities is questioned under the first paragraph of the third section of the Act to Regulate Commerce, comparisons based on mileage are usually confined to the carrier's own line or system, as in the case of charges of violations of the fourth or long and short haul section of the Act, or in cases where it is alleged that the carrier charges more per ton per mile over one part of its road, than over another part.

In the case of *Eau Claire Board of Trade vs. Chicago, M. & St. P. R. Co., 4 I. C. Rep., page* 65, the Commission says:

"A railroad cannot be said to 'discriminate' against a town which it does not reach and in whose carrying trade it does not participate. Preference, prejudice, and other like terms imply comparison, and the basis of comparison is wanting unless the rates compared are made by the same carrier."

In the Maximum Rate cases, the Commission made its comparison between two distinct, independent carriers, operating their lines through widely separated territory, and under widely divergent circumstances and conditions. It compared the rates per ton, per mile, of the carriers from Central territory to the Southern territory, with the rates per ton, per mile, of the carriers from the Eastern seaboard territory to the Southern territory, and declared the former to be relatively unreasonable.

The comparison itself was improper; but what made it unfair and misleading was the fact that it was made with the Eastern *all-rail* lines, instead of the water and rail lines, by which these rates are established, and which carry most of the traffic from Eastern cities to Southern points.

Such a comparison with the water and rail lines,

would not, however, have sustained the theory of the Commission as to the great disparity of rates.

It is well known that railroads have to be operated under widely divergent circumstances and conditions, and that therefore comparisons between the rates of different roads or groups of roads can serve no useful purpose,—that they are unfair and misleading.

In the case of *Business Men's Association of the State of Minnesota vs. Chicago and Northwestern R. R. Co.*, 2 I. C. Rep., 48, the Commission holds that:

"Comparisons of rates charged by railroad companies under circumstances and conditions substantially dissimilar, really prove nothing, and cannot be adopted as standards in arriving at the reasonableness and justness of rates."

The Commission which decided the Maximum Rate cases does not concur in that opinion. It says in its conclusions in justification of such comparisons:—

"Where the reasonableness of rates is in question, comparison may be made not only with rates on another line of the same carrier, but also with those on the lines of other and distinct carriers—the value of the comparison being dependent in all cases upon the *degree* of similarity of circumstances and conditions attending the transportation for which the rates compared are charged."

And accordingly the Commission established an entirely novel theory of rate-making. It holds that the rates per ton, per mile, on the different classes of freight of one railroad, can properly be used as a basis for the construction of tariffs for one or more other and independent carriers—that all that is necessary to do is to ascertain the degree of dissimilarity of circumstances

and conditions attending the transportation, and to make proper allowances for the same in the rates per 100 pounds on the corresponding classes.

It will be seen that it applied this theory to the construction of its maximum rate tariffs, which it ordered the defendant carriers to put in effect. It assumed that the rates from Chicago to Cincinnati and other Ohio river crossings, are reasonable in themselves, upon the ground, that there is no complaint—and no evidence authorizing the Commission to find that they are unreasonable.

It then makes these rates per ton, per mile, the basis of rates for the defendant carriers,—making allowances for the *degree* of dissimilarity due to the greater tonnage of the roads from Chicago to Cincinnati, and the greater cost of transportation per ton, per mile, of the roads south of the Ohio river.

This diversity of conditions the Commission fixes at from 35 to 50 per cent.

We have seen that the average cost of transportation per ton, per mile, is mere guesswork, and cannot be made a factor in the establishment of rates.

As to the diversity of other conditions, the following figures, taken from the Interstate Commerce Commission's Annual Report on the Statistics of Railways in the United States for the year ending June 30, 1893, will show the diversity of circumstances and conditions under which railroads are operated in the Eastern Seaboard territory, Central territory, and the Southern territory:

SUMMARY SHOWING PUBLIC SERVICE OF RAILWAYS, BY GROUPS—PASSENGER SERVICE.

Territory Covered.	Passenger Train Mileage.	Number of Passengers Carried.	Number of Passengers Carried One Mile.	Number of Passengers Carried One Mile per Mile of Line.	Average Number of Passengers in Train.	Average Journey per Passenger.
						Miles.
Group I	32,429,910	127,973,830	1,981,162,852	267,006	61	15.48
Group II	84,641,627	224,434,909	3,881,472,564	201,416	46	17.29
Group III	55,608,091	69,386,673	2,210,614,972	101,609	40	31.86
Group IV	14,330,388	11,573,922	433,739,981	41,068	30	37.48
Group V	24,505,337	19,594,628	753,944,248	44,336	31	38.48
Group VI	60,852,137	98,371,942	2,499,335,975	62,522	41	28.28
Group VII	11,226,286	5,090,895	391,456,307	37,554	35	76.89
Group VIII	26,356,851	16,520,377	899,941,666	42,422	34	54.47
Group IX	10,166,196	6,759,084	341,961,144	33,526	34	50.59
Group X	15,501,947	23,854,352	835,471,375	69,897	54	35.02
Total—United States.	335,618,770	593,560,612	14,229,101,084	83,809	42	23.97

SUMMARY SHOWING PUBLIC SERVICE OF RAILWAYS, BY GROUPS—FREIGHT SERVICE.

Territory Covered.	Freight Train Mileage.	Number of Tons of Freight Carried.	Number of Tons of Freight Carried One Mile.	Number of Tons of Freight Carried One Mile per Mile of Line.	Average Number of Tons in Train.	Average Haul per Ton.
Group I	27,502,384	45,596,109	3,325,369,933	448,168	120.91	72.93
Group II	120,033,157	261,500,296	28,605,650,259	1,484,392	238.31	109.39
Group III	36,888,078	159,484,489	19,225,447,802	883,679	221.27	120.55
Group IV	21,281,760	23,354,743	3,821,116,366	361,739	179.55	163.61
Group V	37,041,989	56,349,897	5,910,209,603	347,550	159.55	104.88
Group VI	110,590,117	117,704,151	17,682,449,928	442,333	159.89	150.23
Group VII	18,912,421	16,238,160	2,792,170,224	267,865	147.64	171.95
Group VIII	47,516,489	37,399,510	6,809,855,971	321,006	143.32	182.08
Group IX	19,650,495	14,201,052	2,693,091,217	264,032	137.05	189.64
Group X	19,302,616	13,291,075	2,722,750,030	227,791	141.06	204.86
Total—United States.	508,719,506	745,119,482	93,588,111,833	551,232	183.97	125.60

It will be seen that the number of passengers carried one mile, per mile of line, by the Roads in Group II (New York, Pennsylvania, New Jersey, Delaware and Maryland), during the year ending June 30, 1893, was 201,416, while the Roads in the Southern territory, Group IV (West Virginia, Virginia, North Carolina and South

Carolina) carried during the same period, 41,068 passengers one mile, per mile of line, being 390 per cent. less than the number carried by the Roads in Group II.

The number of passengers carried one mile, per mile of line, by the Roads in Group V (Kentucky, Tennessee, Georgia, Florida, Alabama and Mississippi), was 354 per cent. less than the number carried by the Roads in Group II.

It will be seen by the table of freight service that the number of tons carried one mile, per mile of line, by the Roads in Group IV, was 361,799 tons, or 310 per cent. less than the number of tons carried by the Roads in Group II, which Roads carried 1,484,392 tons one mile, per mile of line.

The number of tons carried one mile, per mile of line, by the Roads in Group V, was 347,550, or 327 per cent. less than the tonnage carried by the Roads in Group II.

The following comparisons between the traffic of the Roads in Group III, and the traffic of the Roads in Groups IV and V, will be of special interest in connection with the cases under consideration, because the Interstate Commerce Commission states that it has made the rates per ton, per mile, on the six classes of certain Roads belonging to Group III (Ohio, Indiana and Michigan), and Group VI, the basis of constructing the maximum rates on the six numbered classes which it has prescribed for the defendant Roads:

Group III.	Number of passengers carried one mile, per mile of line.....	101,609
Group IV.	" " " " " "	41,068
	Excess, Group III over Group IV.....	60,541
	Equal to about 147 per cent.	
Group III.	Number of tons carried one mile, per mile of road.....	883,679
Group IV.	" " " " "	361,799
	Excess, Group III over Group IV.....	521,880
	Equal to about 144 per cent.	
Group III.	Number passengers carried one mile, per mile of road.....	101,609
Group V.	" " " " "	44,336
	Excess, Group III over Group V.....	57,273
	or about 129 per cent.	
Group III.	Number of tons carried one mile, per mile of road.....	883,679
Group V.	" " " "	347,550
	Excess Group III over Group V.....	536,129
	or about 154 per cent.	

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

The figures in the following tables, also taken from the Sixth Annual Report on the Statistics of Railways in the United States for the year ending June 30, 1893, will "impress in a most vivid manner the diversity of conditions under which the railways of the United States are administered." (The language is that of the Statistician to the Commission, used on page 47 in such Annual Report.)

CONDENSED INCOME ACCOUNT, BY GROUPS.

ITEM.	GROUP I. (7,419.92 miles of line represented.)		GROUP II. (19,270.95 miles of line represented.)		GROUP III. (21,756.15 miles of line represented.)		GROUP IV. (10,561.44 miles of line represented.)	
	Amount.	Per mile of line operated.	Amount.	Per mile of line operated.	Amount.	Per mile of line operated.	Amount.	Per mile of line operated.
Gross earnings from operation	$86,895,478	$11,711	$312,969,720	$16,240	$187,372,469	$8,612	$43,843,340	$4,151
Less operating expenses	60,801.378	8,194	206,137,395	10,697	134,607,313	6,187	30,425,792	2,881
Income from operation	26,094,100	3,517	106,832.325	5,543	52,765,156	2,425	13,417,548	1,270
Income from other sources	8,257,763	1,113	52,599,120	2,730	18,628,164	856	3,770,125	357
Total income	34,351,863	4,630	159,431,445	8,273	71,393,320	3,281	17,187,673	1,627
Total deductions from income	19,984,465	2,693	114.355,777	5,934	54,328,304	2,497	17,766,691	1,682
Net Income	14,367,398	1,937	45,075,668	2,339	17,065,016	784	[1] 579,018	[1] 55
Total dividends (including "other payments from net income.")	[2] 13,471,736	1,816	[3] 36,643,961	1,902	[4] 16,433,217	755	[5] 1,870,487	177
Surplus from operations	895,662	121	8,431,707	437	631,799	29	[1] 2,449,505	[1] 232

CONDENSED INCOME ACCOUNT, BY GROUPS—(Continued).

ITEM.	GROUP V. (17,005.34 miles of line represented.)		GROUP VI. (39,975.40 miles of line represented.)		GROUP VII. (10,423.80 miles of line represented.)	
	Amount.	Per mile of line operated.	Amount.	Per mile of line operated.	Amount.	Per mile of line operated.
Gross earnings from operation	$81,544,648	$4,796	$245,964,280	$6,153	$47,397,473	$4,547
Less operating expenses	58,321,252	3,430	159,106,507	3,980	30,609,057	2,936
Income from operation	23,223,396	1,366	86,857,773	2,173	16,788,416	1,611
Income from other sources	8,606,602	506	20,698,852	518	5,407,990	518
Total income	31,829,998	1,872	107,556,625	2,691	22,196,406	2,129
Total deductions from income	31,178,350	1,834	74,535,564	1,865	21,745,358	2,086
Net income	651,648	38	33,021,061	826	451,048	43
Total dividends (including "other payments from income"	4,281,421	257	[6]21,276,287	532	2,918,092	280
Surplus from operations	[1]3,729,773	[1]219	11,744,774	294	[1]2,467,044	[1]237

[1] Deficit.
[2] Includes $105,426 "other payments from net income."
[3] Includes $111,056 "other payments from net income."
[4] Includes $693,938 "other payments from net income."
[5] Inc'udes $139,459 "other payments from net income."
[6] Includes $445,617 "other payments from net income."

It will be seen by the above table that the gross earnings of the Roads in Group III were $8,612 per mile of line operated, as against $4,151 in Group IV, and $4,796 in Group V; that is, about 107 per cent. less for Group IV, and 80 per cent. less for Group V (these two groups embracing the railroads in the Southern Railway and Steamship Association), than for Group III, embracing Roads north of the Ohio river, in Central territory.

The net income from operation, per mile of road operated, was, for Group III, $2,425, and for Group IV, $1,270, or 90 per cent. less than for Group III. For

Group V, it was $1,366, or about 77 per cent. less than for Group III.

The net income per mile of line operated, after deducting fixed charges, etc., was, for Group III, $784; for Group IV, there was a deficit of $55 per mile of line operated, and for Group V the net income per mile of line operated was $38, or 1963 per cent. less than for Group III.

These comparisons illustrate the unfairness of the comparisons and deductions made by the Interstate Commerce Commission in its statement of facts, and "conclusions," and they show the gross injustice of adopting as a basis of constructing rates for the Southern railroads, the rates per ton, per mile, of the Roads north of the Ohio river, in the Central territory.

The question arises: How is it possible for the Commission to fix the arithmetical values of these diversities, and establish percentage allowances for them?

This novel theory of rate-making is not only false in theory, but impracticable in practice, as the Commission found when it came to apply it to the construction of its maximum rates.

The following table will show that it was unable to adhere to the 35 to 50 per cent. allowance for diversity of conditions, and that, as a matter of fact, it had to *guess* at the rates themselves, as it had previously guessed at the basis of its rate construction:

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

TABLE

SHOWING RATES ESTABLISHED BY COMMISSION, AND RATES MADE ON EQUAL MILEAGE BASIS OF THE RATES PER TON, PER MILE, OF THE TRUNK LINES, FROM CHICAGO TO CINCINNATI.

To	From Cincinnati.	Classes.					
		1	2	3	4	5	6
	Rates per ton, per mile, from Chicago to Cincinnati	2.68	2.28	1.68	1.14	1.00	.80
Knoxville	Rates established by Commission	53	45	37	27	22	20
Miles from Cincinnati, 290.	Rates based on rates per ton, per mile, from Chicago to Cincinnati.	39	33	24	17	14½	12
	Excess Commission rates over equal mileage rates	14	12	13	10	7½	8
	Percentage of excess	36	36	48	59	47	67
Chattanoga	Rates established by Commission	60	54	40	30	24	22
Miles from Cincinnati, 335.	Rates based on rates per ton, per mile, Chicago to Cincinnati	45	38	28	19	17	13½
	Excess of Commission rates over equal mileage rates	15	16	12	11	7	8½
	Percentage of excess	33	42	43	50	41	63
Rome	Rates established by Commission	75	64	54	44	34	24
Miles from Cincinnati, 413	Rates based on rates per ton, per mile, Chicago to Cincinnati	55	47	34½	23½	20½	16½
	Excess of Commission rates over equal mileage rates	20	17	19½	20½	13½	7½
	Percentage of excess	36	36	56	87	66	45
Atlanta	Rates established by Commission	86	73	60	45	35	27
Miles from Cincinnati, 475.	Rates based on rates per ton, per mile, Chicago to Cincinnati	63½	54	40	27	24	19
	Excess of Commission rates over equal mileage rates	22½	19	20	18	11	8
	Percentage of excess	35	35	50	67	46	42
Meridian	Rates established by Commission	114	98	80	62	49	38
Miles from Cincinnati, 630.	Rates based on rates per ton, per mile, Chicago to Cincinnati	84½	72	53	36	31½	25
	Excess of Commission rates over equal mileage rates	29½	26	27	26	17½	13
	Percentage of excess	35	36	51	72	55	52
Birmingham	Rates established by Commission	87	74	60	46	36	28
Miles from Cincinnati, 478.	Rates based on rates per ton, per mile, Chicago to Cincinnati	64	54½	40	27	24	19
	Excess of Commission rates over equal mileage rates	23	19½	20	19	12	9
	Percentage of excess	36	35	50	70	50	47
Anniston	Rates established by Commission	86	73	60	45	35	27
Miles from Cincinnati, 476.	Rates based on rates per ton, per mile, Chicago to Cincinnati	64	54	40	27	24	19
	Excess of Commission rates over equal mileage rates	22	19	20	18	11	8
	Percentage of excess	34	35	50	67	46	42
Selma	Rates established by Commission	108	92	78	60	48	36
Miles from Cincinnati, 598.	Rates based on rates per ton, per mile, Chicago to Cincinnati	80	68	50	34	30	24
	Excess of Commission rates over equal mileage rates	28	24	28	26	18	12
	Percentage of excess	35	35	56	76	60	50

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

The following comments on the Commission's method of rate-making, taken from my monograph of October 23, 1894, on "The Adjustment of Railway Freight Rates," may prove of interest:

"In considering the subject of classifications in connection with the question of reasonableness, in and of themselves, of rates on the numbered classes, we called attention to the unfairness of the comparison made by the Interstate Commerce Commission between the rates per ton, per mile, on the six classes of the Trunk Lines' Classification from Chicago to New York, and the rates per ton, per mile, on the six numbered classes, of the tariff of the defendants, from Cincinnati, to the points in the Southern Territory, the Trunk Lines' Classification having six classes, while the tariff of the defendants (Southern Railway and Steamship Association Classification) has 13 classes.

"The comparison made by the Interstate Commerce Commission is between two dissimilar things.

"It is impossible to ascertain what is the 'degree of similarity,' or to make a proper allowance for such degree even if it could be ascertained. For, as we have seen, the articles embraced in the six classes of the 13-class classification of the defendant carriers, are not the same as those embraced in the six classes of the Trunk Line Classification, and a large number of articles embraced in the seven lettered classes of the defendants are in the 6th Class of the Trunk Line Classification; so that for this, if for no other reason, the rate per ton, per mile, on the latter must necessarily be much lower than the rate per ton, per mile, on the former.

"The Interstate Commerce Commission appears to have lost sight of the fact that classifications form a necessary part of railroad tariffs, and that there is a vital connection between the classifications of a road, and its rates of transportation:—that the classifications of articles to be transported over a railroad are made with reference to the rates established on the several classes; and that one cannot be separated from the other and considered by itself.

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

"Rates have no meaning without a classification, and the classifications have no meaning when disconnected from rates. We have also seen that neither the rate per ton, per mile, of each class, nor the average rate per ton, per mile, of all the classes of one railroad, can properly be used for the purpose of comparison with those of another railroad, with the view of ascertaining the reasonableness, in and of themselves, of rates on certain classes of freight. How these same rates per ton, per mile, which cannot legitimately be used for the purpose of comparison, can be made a basis of rate construction, is utterly incomprehensible.

"The above tables will throw some light upon the method of rate construction that has been adopted by the Interstate Commerce Commission. It appears by these tables that the rate construction of the Interstate Commerce Commission is full of incongruities.

"One must infer, from the language of the decision, that an allowance of from 35 to 50 per cent. over and above the equal mileage rates of the Trunk Lines per ton, per mile, had been made in the construction of the Commission's tariff. But we find that this allowance varies from 33 per cent. on the first class, Cincinnati to Chattanooga, to 87 per cent. on the fourth class, Cincinnati to Rome.

"If equal mileage is a proper basis of rate construction, then whatever allowance the Interstate Commerce Commission may have made for 'cost and tonnage' in the rates per ton, per mile, on the six classes to one point in the Southern territory, should have been applied to the same classes, respectively, that govern the rates to other points. But we find that, with but few exceptions, this allowance varies within wide limits on the different classes of freight to different points of destination.

"For example, the equal mileage basis having been adopted, can any good reason be given why the percentage allowance on rates from Cincinnati should be:

	1	2	3	4	5	6
To Chattanooga	33	42	43	50	41	63
And to Selma	35	35	56	76	60	50

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

"In the Commission's rate construction, the allowance for 'cost and tonnage' varies from 33 per cent. on first class to Chattanooga, to 87 per cent. on fourth class to Rome, and, with few exceptions, such allowance is not the same on the same classes to the different points.

"For example, it is 33 per cent. on first class to Chattanooga, 36 per cent. to Knoxville, and 35 per cent. to Selma. On fourth class freight the allowance is 59 per cent. to Knoxville, 50 per cent. to Chattanooga, 87 per cent. to Rome, 67 per cent. to Atlanta, and 76 per cent. to Selma.

"Similar inconsistencies will be found in the rates of every class to every point of destination, from Chicago, as well as from Cincinnati. Upon comparing the rates established by the Commission with what these rates would be if established on an 'all-rail' and 'equal mileage' basis of the rates per ton, per mile, from New York, it will be found that the Commission has not adopted that basis in its rate construction; and in making the comparison with the rates on the basis of the so-called 'rate-making mileage' from New York, it will be seen that that basis has not been adopted, probably for the reason that it would make the rates to many points in the Southern territory, both from Cincinnati and Chicago, in many cases higher than the rates established by the Commission.

"In view of these facts and figures it is impossible to escape the conclusion that the rates established by the Commission, and which the defendant carriers have been ordered to put in effect, have not been constructed upon any basis whatsoever, but that *they have been guessed at by the Commission.*"

A comparison between the maximum rates prescribed by the Commission, and the then existing rates from Cincinnati, shows the following reductions:

THE MAXIMUM RATE CASES AN OBJECT LESSON IN RATE-MAKING BY THE GOVERNMENT.

From Cincinnati.

To		Classes.					
		1	2	3	4	5	6
Knoxville.....	Current rates.....	76	65	57	47	40	30
	Rates established by Commission..	53	45	37	27	22	30
	Reduction.....	23	20	20	20	18	10
	Percentage of reduction.....	30	31	35	43	45	33
Chattanooga..	Current rates.....	76	65	57	47	40	30
	Rates established by Commission..	60	54	40	30	24	22
	Reduction.....	16	11	17	17	16	8
	Percentage of reduction.....	21	17	30	36	40	27
Rome.....	Current rates.....	107	92	81	68	56	46
	Rates established by Commission..	75	64	54	44	34	24
	Reduction.....	32	28	27	24	22	22
	Percentage of reduction.....	30	30	33	35	39	48
Atlanta.....	Current rates.....	107	92	81	68	56	40
	Rates established by Commission..	86	73	60	45	35	27
	Reduction.....	21	19	21	23	21	19
	Percentage of reduction.....	20	21	26	34	38	41
Meridian.....	Current rates.....	122	102	89	75	62	54
	Rates established by Commission..	114	98	80	62	49	38
	Reduction.....	8	4	9	13	13	16
	Percentage of reduction.....	6	4	10	17	21	30
Birmingham...	Current rates.....	89	79	68	55	47	36
	Rates established by Commission..	87	74	60	46	36	28
	Reduction.....	2	5	8	9	11	8
	Percentage of reduction.....	2	6	12	16	23	22
Anniston.....	Current rates.....	107	92	81	68	56	46
	Rates established by Commission..	86	73	60	45	35	27
	Reduction.....	21	19	21	23	21	19
	Percentage of reduction.....	20	21	26	34	38	41
Selma.....	Current rates.....	108	102	88	71	49	47
	Rates established by Commission..	108	92	78	60	48	36
	Reduction.....	0	10	10	11	11	11
	Percentage of reduction.....	0	10	11	16	19	23

In referring to the reduced rates, the Interstate Commerce Commission says:—

"They are, it seems scarcely necessary to add, prescribed as maximum rates, and are not intended to be prohibitory of such lower rates as the carriers interested may find to be just and reasonable."

This seems a stroke of bitter irony, though probably not so intended.

The Commission, in referring to the decision, further says:

"We are not unmindful that a compliance with the order in these cases may and probably will necessitate a readjustment of rates from Central territory to other points in Southern territory than those named. But, as we took occasion to say in the case of *The Board of Trade of Troy* v. *Alabama M. R. Co.*, 'it cannot be held to be a valid objection to the correction of unlawful rates to one locality, that it involved a like correction to other localities.' "

The Commission did not seem to understand and appreciate the far-reaching effects of its decision. Not only would a compliance with its order necessitate a "readjustment of rates from Central territory to other points in Southern territory than those named," but it would have necessitated a revision of the local and through freight tariffs of the defendant carriers, involving great reductions of rates from Cincinnati and Louisville proper, to nearly all points in the Southern territory, including many of the short haul local rates on interstate traffic.

The reductions shown in the above table do not fully measure the enormous losses that would have resulted to the defendant carriers from the ruthless slaughter of rates ordered by the Commission; for the carriers would have been obliged to adjust their rates in conformity with the requirements of the fourth or so-called long and short haul section of the Act to Regulate Commerce; and as we have seen, the Commission had materially modified its earlier opinions as to the circumstances and conditions that justify a greater charge for the shorter than for the longer haul.

But the general slaughter of rates would not have stopped with the revision of the tariffs from Cincinnati, Chicago, and other points north of the Ohio river, to Southern territory. For a reduction of the rates from that territory would have been immediately followed by reduced rates from Eastern seaboard territory to points in Southern territory, so as to maintain the relative adjustment of rates, and the effect of the decision would have been to foment strife between the Western and Eastern lines, causing enormous losses of revenue to both, and without benefit to any one. For the object of the decision could not be attained by the order of the Commission, because the Commission had no power to prescribe minimum rates from Eastern seaboard territory to the Southern territory by the Eastern water and rail lines.

As already stated, it was shown before the House Committee on Interstate Commerce, that the defendant carriers would have lost at the rate of $3,000,000 per annum if the decision of the Commission had been sustained by the courts.

Upon an analysis of the opinion and decision of the Commission in these cases, it was found that the grounds upon which its conclusions rest are wholly untenable.*

SOME LEGAL QUESTIONS INVOLVED IN RATE-MAKING BY THE GOVERNMENT.

While it would be presumptuous for a layman to discuss legal questions, he may venture, for the purposes of this inquiry, to refer to and quote the opinions of men learned in the law.

* See "The Adjustment of Railway Freight Tariffs," by Henry Fink, October, 1894.

SOME LEGAL QUESTIONS INVOLVED IN RATE-MAKING BY THE GOVERNMENT.

THE COMMERCE CLAUSE IN THE CONSTITUTION.

"The congress shall have power * * * to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

Constitution of the United States, Art. I, Sec. 8, Par. 3.

"The Congress shall have power to make all laws which shall be necessary and proper for carrying into effect the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or any officer thereof."

Art. I, Sec. 8, Par. 18.

"No tax or duty shall be laid on articles exported from any state. No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

Art. I, Sec. 9, Par. 5.

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Amendment X (declared ratified January 8, 1798).

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Art. XIV, Sec. 1 (declared ratified July 28, 1868).

SOME LEGAL QUESTIONS INVOLVED IN RATE-MAKING BY THE GOVERNMENT.

FROM "THE LAW OF INTERSTATE COMMERCE," BY FREDERICK N. JUDSON.

GIBBONS *vs.* OGDEN.

"The judicial construction of the commerce clause begins in 1824 with the great opinion of Chief Justice Marshall in Gibbons *vs.* Ogden, wherein a grant of the State of New York for the exclusive right to navigate the waters of New York with boats propelled by fire or steam was held void as repugnant to the commerce clause of the constitution, so far as the act prohibited vessels licensed by the laws of the United States for carrying on the coast trade from navigating the said waters by fire or steam.

"The broad and comprehensive construction of the term 'commerce' in this opinion is the basis of all subsequent decisions construing the commerce clause, and is the recognized source of authority. Commerce is more than traffic; it includes intercourse. The power to regulate is the power to prescribe the rules by which commerce is to be governed. This power like all others vested in congress is complete in itself, and may be exercised to its utmost extent, and acknowledges no limitations other than as prescribed in the Constitution. The power over commerce with foreign nations and the several states, said the court, is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as is found in the constitution of the United States. The power comprehended navigation within the limits of every state, so far as navigation may be in any manner connected with commerce with foreign nations or among the several states, or with the Indian tribes, and therefore it passed beyond the jurisdictional line of New York and included the public waters of the state which were connected with such foreign or interstate commerce."

"The most important and far-reaching declaration in the opinion was that of the supremacy of the federal power, so that in any case of conflict the act of congress

was supreme, and state laws must yield thereto, though enacted in the exercise of powers which are not controverted."

THE ADOPTION OF THE FOURTEENTH AMENDMENT.

"Prior to the adoption of the Fourteenth Amendment, in 1868, there was no appeal to the federal courts against any violation by state power of due process of law or of the equal protection of the laws, which did not involve an interference with national authority or a violation of some provision of the federal constitution. The federal courts administered the state laws and followed, as they still do, the decision given by the state courts as to the construction of the state statutes.

"The Fourteenth Amendment provided in its first clause that no state should deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Corporations are persons under this amendment and are therefore entitled to due process of law and to the equal protection of the laws, and a state has no more power to deny the equal protection of the laws to a corporation than it has to individual citizens.

"This far-reaching change in our judicial system, wherein the fundamental rights of property are protected by the federal power against state invasion, was adopted about the same time that the judicial declaration of the freedom of interstate commerce against state interference had opened the way for the direct exercise of the federal regulating power."

From an article published in the *Harvard Law Review*, by Victor Morawetz (June, 1905):

"The power of Congress to regulate railway rates is based upon Section 8 of Article I of the Constitution, which confers upon Congress power 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes.'

"This grant of power to Congress is, however, limited

by Section 9 of the same Article, which provides that 'No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.'

"The power of Congress is also limited by the Fifth Amendment, which provides that no person shall 'be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.' Furthermore, the power of Congress is subject to certain well-settled constitutional limitations underlying our form of government; namely: (1) Congress cannot delegate its legislative powers; (2) Congress cannot confer judicial powers except upon courts established in the manner provided in the Constitution, and (3) Congress cannot confer non-judicial powers upon a duly established court."

It is universally admitted that Congress has the power to regulate the charges of railway companies in respect to interstate transportation.

Can Congress Constitutionally Delegate this Power to a Commission Created by Itself?

No case involving this question having as yet come before the Supreme Court of the United States, no authoritative answer to this question can be given. It is to be noted, however, that in the Maximum Rate cases, the Supreme Court has said that "Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty."

Opinion of Attorney-General Moody.

In response to the request of the Senate Committee on Interstate Commerce, Attorney-General Moody has recently given an exhaustive opinion as to the right of the Government to regulate operations of railroads, from which the following is a quotation:

"It was settled in the group of cases commonly called the Granger cases, that there is a Governmental power to regulate operations of railroads acting as common carriers, and as a part of such regulation, to prescribe the maximum rates which they may charge in the future for the services which they shall render to those who resort to them, and that the power is vested in, and may be exercised by, the legislative branch of the Government."

"These cases affirm the right of a State Legislature to confer the power in question upon a State Commission. No reason has been advanced, and none can be perceived, why the same principles would not apply to Congress. The right of Congress to confer upon a commission the rate-making power was distinctly presented to the court in the case of *The Interstate Commerce Commission* vs. *Cincinnati, New Orleans and Texas Pacific Railway Company.*

"Assuming that the rate-making power is a legislative function and not judicial, it follows that Congress has not the right to vest it in the courts either by conferring original or appellate jurisdiction over the subject."

After citing many Supreme Court decisions to support his opinion, the Attorney General submits this summary:

"FIRST.

"There is a Governmental power to fix the maximum future charges of carriers by railroad vested in the Legislatures of the States with regard to transportation exclusively within the States, and vested in Congress with regard to all other transportation.

"SECOND.

"Although legislative power, properly speaking, cannot be delegated, the law-making body having enacted into law the standard of charges which shall control, may intrust to an administrative body not exercising in the true sense judicial power, the duty to fix rates in conformity with that standard.

"THIRD.

"The rate-making power is not a judicial function, and cannot be conferred constitutionally upon the courts of the United States, either by way of original or appellate jurisdiction.

"FOURTH.

"The courts, however, have the power to investigate any rate or rates fixed by legislative authority, and to determine whether they are such as would be confiscatory of the property of the carrier, and if they are judicially found to be confiscatory in their effect, to restrain their enforcement.

"FIFTH.

Any law which attempts to deprive the courts of this power is unconstitutional.

"SIXTH.

"Any regulation of land transportation, however exercised, would seem to be so indirect in its effect upon the ports that it could not constitute a preference between the ports of different States within the meaning of Article I, Section 9, Paragraph 6, of the Constitution.

"SEVENTH.

"Reasonable, just, and impartial rates determined by legislative authority are not within the prohibition of Article I, Section 9, Paragraph 6 of the Constitution, even though they result in a varying charge per ton per mile to and from the ports of the different States."

The following are extracts from the article by Victor Morawetz, in the *Harvard Law Review:*

"While the original cost, or the cost of reproduction, of the property of a railway company and the rates required to enable the company to earn a fair return upon this cost, are elements to be considered in determining whether a statute fixing maximum rates is unconstitu-

tional because confiscatory, these are not the only elements that must be considered. (Smyth *vs.* Ames, 169 U. S., 546, 547); San Diego Land Co. *vs.* National City, 174 U. S., 739, 757.) The owner of property devoted to a public service cannot be deprived by law of the fruits of his skill, industry and thrift in the management of this property; nor can he be deprived of an increment in the value of this property due to the development of the country or to good fortune. The power to regulate charges in a business of a public character is not based on the ground that the legislature can prevent the owner of property used in this business from earning more than a specified profit upon the cost of this property. It is based on the ground that the legislature can prevent any individual or corporation engaged in a business of a public character from charging more than reasonable compensation for the services rendered. Neither a State nor the United States would have constitutional power to seize the net income of a railway company over and above such sum as the legislature or the courts may deem to be a reasonable return upon the cost of its property. The legislature could not require any such excess to be paid into the State treasury, nor could the legislature give this excess to shippers upon the railway.

"It is to be observed in this connection that the railway companies have not received their franchises from the United States, and that the United States has not conferred upon them the power of eminent domain. Although a State may base a power to regulate railway companies on the ground that they have assumed the performance of a function of the State by accepting the franchises and the power of eminent domain granted by the State, the United States cannot base the power of regulation upon that ground. Accordingly, the rule laid down by Mr. Justice Brewer in Cotting *vs.* Kansas City Stock Yards Co., 183 U. S., 79, 97, with reference to the power of a State legislature to regulate the charges of a stock yards company should be applied. It should be held that Congress, or a commission created by Congress, can declare, subject to review by the courts, what rates in respect of interstate transportation will pay a railway rea-

sonable compensation for its services; but that a railway company cannot, in any case, be deprived of the right to make such charge as is reasonable, having regard to the value of the service rendered, and that it cannot be compelled to reduce its charges merely because the volume of its business enables it to earn large profits on its capital."

* * * * * *

"To fix the rates to be charged by a carrier in the future is a legislative act, and not a judicial act.

"This has repeatedly been pointed out by the Supreme Court of the United States. In the Maximum Rate case, 167 U. S., 479, the Supreme Court used the following language:

'It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act (p. 499).

'The power to prescribe a tariff of rates for carriage by a common carrier is a legislative and not an administrative or judicial function, and, having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance.' (p. 505)."

* * * * * *

"Congress can confer upon a commission power to fix prima facie, the maximum rates that would not be unreasonably high and extortionate as against shippers; but it is doubtful whether Congress can vest in a Commission purely discretionary power to fix rates as it sees fit.

"Section 1 of Article I of the Constitution provides that '*all* legislative powers herein granted shall be vested in a Congress of the United States,' and the general rule is well settled that Congress cannot delegate its legislative powers to any other body.

" 'One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the state has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.' "

[Cooley's Constitutional Limitations (7th ed.), p. 163.]

"It has never been decided that Congress can delegate to a commission the power of prescribing future railway rates, because Congress has never passed any law purporting to do this. In a number of the States, however, such laws, delegating to railway commissioners the power of fixing rates, have been passed, and the constitutionality of such laws has been sustained.

Georgia R. R. Co. *vs.* Smith, 70 Georgia, 694.

Tilley *vs.* Railway Co., 4 Woods (C. Ct.), 427.

McWhirter *vs.* Pensacola Ry. Co., 24 Fla., 417, 471.

Express Co. *vs.* R. R. Co., 111 No. Car., 463, 472.

Chicago, etc., Ry. Co. *vs.* Dey, 35 Fed. Rep., 866.

"These cases are based upon the doctrine that while a legislature may not delegate its strictly legislative powers, yet it may delegate authority to regulate certain matters which in the nature of things require regulation of a quasi-administrative character and which, in the nature of things, could not be satisfactorily regulated by the

legislature itself. (See Field *vs.* Clark, 143 U. S., 649, 692; Buttfield *vs.* Stranahan, 192 U. S., 470.) According to these cases, while the power of fixing rates is a function of the legislature, it is a quasi-administrative function which may be delegated by the legislature to a commission. In upholding the Railroad Commission Law of Georgia, Circuit Judge Woods used the following language:

> 'The true distinction therefore is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done; to the latter no objection can be made.' (4 Woods, 427, 446).

"No doubt Congress can by law prescribe general rules for the regulation of charges of railway companies —for example, Congress can (as it did in the Interstate Commerce Act) prohibit railway companies from charging unreasonably high or extortionate rates and can prohibit them from unduly discriminating in their charges; and Congress can establish a commission or other administrative body with power to carry into effect such gereral rules, including power to make orders fixing *prima facie* what rates shall be deemed unreasonably high or discriminatory and therefore illegal under the statute. Under such a law, the function of the commission would be merely administrative in carrying out the declared legislative will of Congress to prohibit excessive rates or unjustly discriminatory rates, and the Commission itself would not be vested with the legislative power of determining according to its own arbitrary will or ideas of policy what rates shall be charged in the future. Under such a law the action of the Commission, although *prima facie* valid, could be reviewed and set aside by the courts, and the carrier could not be deprived by the Commission of the right to charge any rate it saw fit, provided it be not unreasonably high or unjustly discriminatory.

"Assuming the Congress itself would have constitutional power to fix the rates of the railway companies ac-

cording to its discretion, it would be going a step further to hold that Congress can delegate this discretionary power to a commission. As was pointed out by the Supreme Court, such a power is 'a legislative power * * * of supreme delicacy and importance' (167 U. S., 505), and would enable the Commission to make 'laws of wide import, destroying some branches of commerce that have long existed, and undertaking to change the laws and customs of transportation in the promotion of what is supposed to be public policy' (162 U. S., 234).

> *"Congress cannot vest in the courts power to fix future rates, or to consider and pass upon the wisdom or policy of the Commission in prescribing a particular rate which is neither confiscatory nor unreasonably high.*

"It is well settled that Congress cannot constitutionally require the courts of the United States to perform any duties that are not of a judicial character. Congress cannot require the courts, directly or indirectly, to perform duties of an administrative or of a quasi-legislative character.

> Opinions of the Judges of the Supreme Court in the notes to Hayburn's Case, 2 Dall., 409.
> United States *vs.* Todd, 13 How., U. S., 52.
> Gordon *vs.* United States, 2 Wall, 561.
> *Re* Sanborn, 148 U. S., 222.
> Interstate Commerce Commission *vs.* Brimson, 154 U. S., 447, 484.
> Norwalk Street Railway Company's Appeal, 69 Conn., 576, 597.

"It follows, therefore, that Congress has no constitutional power to require the courts to exercise the legislative or quasi-legislative action of a commission in fixing the rates to be charged by a railway company. Congress has never attempted to confer this power upon the courts, and the precise point, therefore, has not been decided; but a similar question has arisen under State legislation pur-

porting to vest the rate-making power in the courts, and this legislation has been condemned as unconstitutional.

"In State *vs.* Johnson, 61 Kansas, 803, the Supreme Court of Kansas decided that the act of the legislature of that State creating a court called the 'Court of Visitation,' was unconstitutional for the reason that it conferred upon this court the power of prescribing the future rates of railway companies—that being a legislative and not a judicial function. The same conclusion was reached when the validity of this Kansas law was considered by the Circuit Court of the United States in Western Union Tel. Co. *vs.* Myatt, 98 Fed. Rep., 335. See, also, Nebraska Telegraph Co. *vs.* State, 55 Neb., 627, 636.

"DISCRIMINATION AMONG LOCALITIES.

"A grant of discretionary power to fix railway rates within the limits of legality, as heretofore defined, would necessarily include power, through an adjustment of rates, to affect the relative rates of different localities and to aid one locality in the country at the expense of other localities by establishing a differential. In some of the bills introduced at the last session of Congress it is provided in express terms that the Commission shall have power to prescribe 'the just relation of rates to or from common points;' but irrespective of such provisions, the power to do this would necessarily result from any grant of a purely discretionary power of fixing rates.

"The Constitution of the United States provides that 'no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another.' In construing this constitutional prohibition it is to be observed, *first*, that it applies only to regulations of commerce by Congress and not to State legislation giving preferences to certain ports (Munn *vs.* Illinois, 94 U. S., 113, 115); *secondly*, that it does not prohibit individuals or railway companies from voluntarily giving differentials or preferences to certain ports; and *thirdly*, that it applies to *all* regulations of commerce established by Congress, or by a Commission created by Congress. An order of a commission fixing rates can be sustained only

on the theory that it is a regulation of commerce by the legislature, acting through the Commission, and, as has often been decided, such an order of a commission is subject to the same constitutional limitations as a regulation enacted by the legislature in the first instance.

"In the case of Pennsylvania *vs.* Wheeling Bridge Co., 18 How., 421, it was claimed that an act of Congress authorizing the construction of a bridge across the Ohio River at Wheeling, Virginia, was in violation of the constitutional provision that no preference should be given by any regulation of Congress to the ports of one State over those of another, because the construction of this bridge would cause delay and expense in the operation of steamboats upon the Ohio River bound to or from the port of Pittsburg and would virtually give a preference to the port of Wheeling. A majority of the Supreme Court, however, held that the Act of Congress was a legitimate exercise of the power to regulate commerce, although it might give an advantage to the ports of one State which would incidentally operate to the prejudice of the ports of a neighboring State, and that the constitutional prohibition only prevented Congress from giving a *direct* preference to the ports of one State over the ports of another State. Mr. Justice Nelson also expressed the view that what was forbidden was not discrimination between the ports of different States, but discrimination between States, and that in order to bring the case within the prohibition it was necessary to show not merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania. This latter view, however, is not tenable, as is shown by the discussion of the constitutional prohibition in Knowlton *vs.* Moore, 178 U. S., 41, 104, *et seq.*

"It seems clear that an act of Congress regulating interstate commerce is not unconstitutional merely because the regulation would *incidentally, and not directly,* give some advantage to the ports of one State over the ports of another State. The constitutional prohibition would only prohibit a regulation of commerce

directly and necessarily giving a preference to the ports of one State over those of another. The question, therefore, is: Can a direct preference be given to the ports of one State over those of another through an adjustment of railway rates in the United States? Of course, the fact that railways were not known at the time of the adoption of the Constitution has no bearing upon the question. If a law prescribing the rates of railway companies is a regulation of commerce under Section 8 of Article I, it must also be a regulation of commerce under Section 9 of this Article.

It is obvious that an act of Congress, or an order of a commission, merely limiting or fixing the *maximum* rates that may be charged by railway companies would not give a preference to the ports of one State over those of another, because the railway companies leading to each port could compete freely with those leading to other ports by reducing their rates. If, however, Congress or a commission, can fix and prescribe *minimum rates* that cannot be reduced by the carrier at will, or *absolute rates* that can neither be increased nor diminished, it is clear that Congress, or the commission, could so adjust rates as to grant a differential or preference in favor of shipments to or through a certain port as against shipments to or through other ports. The rates for the transportation of grain and other articles for shipment from Chicago to European points could be adjusted so that all such shipments would go via New York, Philadelphia or Baltimore rather than via the Southern ports. The result would be the same as if Congress should enact that upon any shipment between Chicago and Europe via New York, Philadelphia or Baltimore, the shipper should receive a bounty not granted to shippers via the Southern ports.

"It is no answer to say that a regulation of Congress, or of a commission, merely establishing the 'just relation of rates' upon shipments via different ports would not grant a preference to the ports of any State. Stated baldly, this would mean that Congress, or a commission, can take away from a particular port its *natural* advantages by granting a *law-made* advantage to other ports

by means of a preferential regulation of commerce. The Constitution provides that no *preference* shall be given by *any* regulation of commerce to the ports of one State over those of another. To hold that Congress, or a commission, can give to the various ports such preferences as in the judgment of Congress, or of the commission, will equalize their natural advantages would wholly destroy the value of the constitutional prohibition.

"The prohibition of the Constitution against regulations of commerce giving a preference to the ports of any State was designed to prevent sectional legislation that might array one part of the country against another. The Interstate Commerce Act itself recognizes that the Commission is subject to politics, as the Act provides that not more than three of the commissioners shall belong to the same political party. One or the other of the great political parties will always control in the Commission. If power to fix relative rates of transportation to and from different ports or sections of the country should be given to the Commission, the adjustment of railway rates in the United States would inevitably become a political question."

An eminent lawyer has said on the subject of rate-making by the Government:—

"It is true that many of the States have vested State railroad commissions with legislative power to make rates; and so long as these rates are not confiscatory in their character, the Federal courts have held that they can grant no relief. But Congress has wisely refused to vest any such power in the Interstate Commerce Commission. It is an arbitrary and irresponsible power, whether vested in a State or National commission. However untair or unjust the action of the Interstate Commerce Commission may be, it will, if the Commission be vested with the legislative power to fix rates, be practically irresponsible; because in that event, it will be claimed that the courts will have no jurisdiction to review the action of the Commission, unless the rates so fixed be absolutely confiscatory, or it can be affirmatively shown that the Commission acted corruptly."

SOME LEGAL QUESTIONS INVOLVED IN RATE-MAKING BY THE GOVERNMENT.

In commenting upon a bill to enlarge the jurisdiction and powers of the Commission, Mr. Walker D. Hines wrote as follows, under date of December 11, 1901:—

"The bill entitled 'A Bill to Enlarge the Jurisdiction and powers of the Commission,' which is herewith printed, is open to practically all the objections which could exist against any bill giving the Commission the power to make rates.

"As any number of carriers and any number of rates can be complained of in the same petition, the extent of the Commission's rate-making power is practically unlimited, especially as it may also prescribe any and all regulations and practices affecting any and all of such rates. The Commission will have the undoubted power to fix rates, maximum, minimum, and absolute, prescribe differentials between different classes of traffic or different localities, compel connecting carriers to establish through routes and prescribe through rates and divisions thereof, and in fact engage in every branch of the work of the traffic manager of each interstate railroad in the country.

"The provision that if upon review the court shall be of the opinion that the Commission's order was made under some error of law or is upon the facts unjust or unreasonable, it may modify, suspend or revoke same by appropriate decrees, will prove unavailing. If the law authorized the Commission to fix rates, there could be no error of law committed by the Commission in fixing the rates, and the courts would not be disposed to turn themselves into so many railroad commissions for the purpose of investigating anew the facts involved and of deciding what would be just and reasonable rates. They would say that the Commission was made the primary tribunal for passing on these facts, and that it was not incumbent upon them to traverse the same ground again; so that, after all, the matter would be virtually left with the Commission. But even if the courts would take hold of the matter for the purpose of investigating all the facts anew and making the rates over again, the power to do so would

not be constitutionally conferred upon them. The power to make rates and prescribe regulations and practices proposed to be conferred upon the Commission is admittedly a legislative power which cannot be exercised by the courts. The members of the Commission have repeatedly so stated, and the Supreme Court of the United States has so held. Undoubtedly, therefore, the Commission will contend and the courts will hold that they have no power to afford the sort of review contemplated by this act. The only power of the courts will be to set aside the orders of the Commission if they prescribe rates confiscatory in character. In other words, practically the whole margin of profit on the railroad business will be left absolutely to the discretion of the Interstate Commerce Commission.. So long as the Commission leaves any, even the smallest, profit, it can rest secure against any adverse action by the courts if once this legislative power is conferred upon it."*

From Judson's "The Law of Interstate Commerce":—

"AMENDMENTS AND PROPOSED AMENDMENTS OF THE ACT.

"Amendatory acts have been passed by Congress in 1889, 1893 and 1903. The first of these was that of 1889 and gave a shipper an additional summary and effective remedy by writ of *mandamus*, to compel the carrier to furnish equal facilities. That of 1893 remedied the difficulty growing out of the inability to enforce self-incriminating testimony. In 1903 was enacted the so-called Expedition Act, which materially expedited the procedure in suits brought by the United States, or suits prosecuted by direction of the attorney-general in the name of the Interstate Commerce Commission.

"The amendatory act of February 19, 1903, known as the Elkins Law, made very important changes and materially enforced the provisions against discriminations,

* Mr. Walker D. Hines, while in the Law Department of the Louisville and Nashville Railroad Co., and Vice-President in charge of its traffic, has made a special study of the Act to Regulate Commerce, and of the bills that have from time to time been introduced into Congress, enlarging the powers of the Commission. His practical experience in traffic matters naturally adds great weight to his legal opinions. In fact, he is one of the best authorities we have on all questions of law as well as of fact, involved in rate-regulation by the Government.

in that it made the published rates conclusive against the carrier, every deviation therefrom being punishable. The scope of the act was also materially extended as to the parties subject to its provisions. Fine was substituted for imprisonment in the penal provisions of the act.

"None of these amendments have affected the rate-making power of the Commission. A strong agitation has been made for such an amendment to the act as would enable the Commission to determine after hearing, not only what was an unjust and unreasonable rate, regulation or practice, but at the same time to determine what was just and reasonable, and that such determination should become operative without an appeal to the Court as under the present law, and subject only to be set aside by a judicial review at the instance of the carrier. A special court of transportation has also been proposed to review the orders of the Commission in case of appeals.

"Under the act as it now stands, the commission is an investigating and prosecuting administrative body, whose findings are given a *prima facie* force in judicial proceedings. Under the proposed amendment, its finding would become self-enforcing, in that it would be binding upon the carrier unless the court should, upon hearing, restrain its operation. As will be hereafter seen, questions of reasonableness in the adjustment of rates are, in the main, questions of fact, and often involve very complicated circumstances, especially in determining the relation or interdependence of rates in our vast territory. The analogies of ordinary litigation are not applicable, in that every question of rates is adjusted to the then existing circumstances, which may be, and ordinarily will be, materially changed before the court of final review can act. The doctrine of judicial precedent, therefore, has a very limited application. It is also true that a bond given by the carrier as a condition of maintaining a rate found unreasonable by the commission or a court, may be a very inadequate remedy to the parties or industries really injured by such rate, and on the other hand, it is also true that the carrier would be practically without remedy, if compelled to reduce a rate under an order of the Commission which was afterwards set aside on the review in court.

SOME LEGAL QUESTIONS INVOLVED IN RATE-MAKING BY THE GOVERNMENT.

"The fundamental powers of government are necessarily involved in the public regulation of railway charges through the orders of railway commissions. The Supreme Court said in the Maximum Rate case, that the power to prescribe a tariff of rates is a legislative, and not an administrative or judicial function. The power to determine whether an existing rate is or is not reasonable is judicial. Under the present law the Commission is charged with the administrative or executive function of enforcing the law, and also with *quasi* judicial powers in investigating and determining, subject to the approval of the court, the reasonableness of the rates. If to these powers now exercised is added the legislative power of making rates, the reviewing power of the court should extend to the reasonableness of the rates, found unreasonable by the Commission in the exercise of its judicial power, as the necessary basis for the exercise of its legislative power. 'Due process of law' would require this power in the court, whether in interlocutory or on final hearing. As the question in rates is ordinarily one of fact only, the *prima facie* effect of the finding of fact made by the Commission extends to the evidentiary facts, and not to the ultimate conclusion of reasonableness. (1) Other questions may be suggested by this blending of the distinct powers of government in one tribunal, which are premature now to discuss."*

The question of the right of eminent domain is not involved in rate-making by the Government, as very few of the railroads have received their charters from it. But the impression still prevails to some extent, that the right of rate-regulation is derived from the exercise on behalf of the railroad companies, of the right of eminent domain;

"(1) There is a blending of the judicial, legislative and administrative powers in the powers of railroad commissioners in several of the States. The constitutionality of such acts has been sustained both in the State and Federal courts. See Express Co. *vs.* Railroad Co., 111 N. C., 463; Burlington, etc., R. Co. *v.* Dey, 82 Iowa, 312; Chicago, etc., R. Co. *v.* Jones, 149 Ill., 361; Georgia, etc., R. Co. *v.* Smith, 70 Ga., 694. See also the Railroad Commission cases, 116 U. S., 307. In these and other cases the *prima facie* effect given to the findings of the Commission has been sustained. Such a *prima facie* effect, however, might be far more serious where the case is heard in court only upon the record made before the Commission, particularly in its possible bearing upon the question of interlocutory relief, if the Court is concluded by the findings of fact made by the Commission."

that, therefore, they are public corporations, and that the State can do what it pleases with their property. It is interesting to note what William D. Shipman, an ex-Judge and distinguished member of the New York Bar, said on that subject about twenty-six years ago; viz.:

"Whatever right the State may have to intervene in the affairs of a corporation, that right does not rest on the fact that the State has aided the corporation in obtaining the right of way. It would have just the same right to intervene in the affairs of a private carrier who had bought his own land and built his own road over it and no more.

"Its right to intervene by prescribing regulations for the conduct of its business, rests solely upon the public function the corporation performs, and is confined to that alone. Its right to intervene is neither increased, nor diminished, nor strengthened by the mode in which the corporation has obtained title to its property.

"This will be evident when we consider some of the circumstances under which several of the States exercise the right of eminent domain.

"Some of them exercise this right on behalf of corporations and individuals, in condemning land to perpetual flowage for manufacturing purposes. Water power is thus accumulated under the exercise of this right of eminent domain, for the use of cotton mills, woolen mills, and a variety of manufacturing enterprises; and it is immaterial whether these enterprises are carried on by individuals or corporations. But this exercise of the right of eminent domain by which the State assists the manufacturer in obtaining an easement on another's land does not bring to the State, the right to control, or even to meddle with the manufacturer's business. The State gets no right to prescribe the length or width which he shall make his pieces of cloth, nor the price he should charge per yard. His business is as free from State control as if he had acquired his water power by ordinary purchase.

"The State intervenes by regulation in the affairs of banks and insurance companies, but it does not do so on

the ground that it has exercised the right of eminent domain in behalf of those companies, for it never does exercise that right in their behalf.

"This demonstrates that this matter of eminent domain is wholly irrelevant to this entire subject. It should, therefore, be eliminated from the discussion. We must look entirely to another quarter for the source of whatever power the State has in the premises. That source is exclusively in the function of common carriers which railroads exercise, and in the exercise of which they are no more and no less amenable to State supervision, than private persons exercising the same function, are or may be, except when their charters otherwise provide. This doctrine is the foundation of all that part of the opinion of the Supreme Court of the U. S. in Munn *vs.* Illinois, which is germane to the subject. The same doctrine is enunciated by the same Court in the case of Railroad Co. *vs.* Iowa. In the latter case the Chief Justice says:

> 'Railroad companies are common carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may better serve the public in that capacity. They are therefore engaged in a public employment affecting the public interest, and, under the decision in Munn *vs.* Illinois, *supra,* p. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters.'

"Again he says:—

> '*This company* (the railroad company) *in the transaction* of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances.'

"Of course this question has no relation to the power of the State to repeal or alter charters, or dissolve corporations. It relates exclusively to the source and extent of its power to regulate the transaction of their business. In this aspect, the talk about 'corporations,' 'pub-

lic corporations,' and 'eminent domain' becomes mere vapor, and, like vapor, dissolves and disappears."

In answer to an argument advanced by the Chairman of the Board of Trade and Transportation of New York; viz.: "When a citizen puts his money or his property in the rendering of a public service, in the exercise of which he makes use of the sovereign arm of eminent domain, he gives to the public a copartnership therein, which renders the use of that property at all times subject to public control." Judge Shipman said:

"If we are to understand by the expression which I have cited, taken as a whole, that railway companies are 'public corporations,' or in any legal sense 'public enterprises,' I beg leave to dissent. That in one single particular they perform a public function is not disputed. They are common carriers of freight and passengers. To that extent they perform a function which may be said to be 'public' inasmuch as its exercise is of public concern. Whatever regulations the Legislature may prescribe to affect their transaction of business, does not arise out of the fact that they are public corporations, or that they are corporations at all. In this regard, railroad companies stand in the same relation to the public and the law-making power, as private persons who exercise the business of common carriers. On this point I cite Waite, *C. J.*, in Munn *vs.* Illinois, 4 Otto, 125.

"To proceed upon the theory that railroad companies are public corporations is to involve the subject in error and confusion. The only public corporations in this country are those created by Government for political purposes, except pecuniary or business corporations in which the Government owns all the stock. 'If the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution—a bank created by the Government for its own uses and where the stock is exclusively owned by the Government, is a public corporation. * * * But a bank whose stock is

owned by private persons is a private corporation, though its objects and operations partake of a public nature, and though the Government may have become a partner in the association by sharing with the corporators in the stock. The same thing may be said of insurance, canal, bridge, turnpike and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single person.' (Kent's Com., vol. 2, p. 275, side paging.)

* * * * * *

"But it is said that railroads are common carriers for hire; and, therefore, in the language of Sir Matthew Hale, are in their business 'affected with a public interest;' and upon that ground public policy requires, that their business should be regulated and controlled by a legislative code. This expression, 'affected with a public interest,' originated with Sir Matthew, and was adopted by Chief Justice Waite, in his opinion in Munn *vs.* Illinois. The opposing counsel, in his opening speech, refers to both the ancient and modern jurist, and he will pardon me for saying, rather mixes their ideas, not only with each other, but with his own pet theory about eminent domain. The latter subject was not at all in the case of Munn *vs.* Illinois, nor do I remember that it was alluded to in the Granger cases."

The untrained mind of the layman becomes sorely perplexed in trying to understand by what process of reasoning the power of Congress to *control* interstate commerce and its instruments, is evolved from the delegation by the States to the Federal Government, of the power to *regulate* commerce for the avowed purpose of preventing restrictions by any State that might interfere with freedom of intercourse between the States.

It would appear to the layman that the right to regulate commerce to the extent of *assuming control* of the property of railroads, cannot rest upon the exercise

by the Federal Government, of the right of eminent domain, because, with very few exceptions, the railroads of this country hold their charters from the States. Nor can such right be based upon the police power of the Government. The fact that the property of railroads is "subjected to a public use," as is the case with numerous other properties, would seem to be a very slender foundation for so vast a superstructure.

Moreover, the layman may ask: Does not the same power to control the instrument of commerce also control commerce itself? The rates of freight constitute but a small, and on many commodities, an insignificant, part of the prices at which they are sold. Why is it not proposed to fix the prices of the commodities and to prohibit unjust discriminations in such prices? Can it be because such attempts would prove futile, those prices being subject to the law of supply and demand? But are not the prices (rates) of transportation subject to the same law? And if Congress undertakes to fix railroad rates, justice would seem to demand that it should at least fix the prices of labor and materials that are indispensable in the operation of the instruments of commerce, if it has the power to do so.

However, the only course that appears to the layman to be open to owners of railroads in this country, is to recognize the power of Congress to do what it pleases with their properties, and to accept with resignation, such legislation as Congress, in its wisdom, may enact, and the Supreme Court of the United States shall approve. In the matter of rate-making by the Government, the owners of railroads can probably rely for the protection of their property, more upon the fact that this scheme of rate-making is utterly impracticable, than upon any provisions of the Constitution.

RATE-MAKING BY THE GOVERNMENT IN ENGLAND.

Some advocates of additional legislation, when compelled to admit that the power to revise rates as proposed is practically rate-making power, refer to the English system, saying: "Why should it work harm here? It is operated successfully in England."

It has been pointed out frequently that the conditions under which English and American railways are operated, are not parallel,—that the constitution and functions of the Railway and Canal Commission, and of the Interstate Commerce Commission, differ very materially; and, moreover, that the English Commission has not general rate-making powers.

The members of the American Commission are political appointees who hold office for six years. Not one of them is required to have any experience in railroad matters. They combine the incompatible functions of detectives, prosecuting attorneys and judges. The American Commission may initiate proceedings and cause prosecutions to punish violations of the law. The Railway and Canal Commission of England, under the Railway and Canal Traffic Act of 1888, and prior Acts, is a court of record consisting of five members, two of whom are appointed by recommendation of the English Board of Trade. They hold office for life or during good behavior. One of them must have some experience in railroad operation. The other three are judges of the higher courts of the realm, assigned for duty on the Commission for not less than five years. One is nominated for England by the Lord Chancellor; one for Scotland by the President of the Scottish Court of Session; and one for Ireland by the Lord Chancellor of Ireland. The Railway and Canal Commission does not instigate any examinations. It does not prosecute any cause, nor act as inquisitor, as the American

Commission does. It hears and decides cases of alleged violations of any law regulating railroads. It has certain powers of arbitration, and its approval of certain agreements between railroads, and between railroads and canals, is required. It may also direct that certain through rates be established, but in a very limited way.

Parliament reserves to itself almost wholly, the rate-making power through the initial action of one of its departments,—the Board of Trade, of which a Cabinet member is usually President. The railways submit to this Board, their classifications and maximum rates. If objections are made, the matter is referred to a select committee of the House of Commons, or to a joint committee of the House of Commons and the House of Lords; and the rates do not become effective until an act is passed.

It will be seen that fixing rates is recognized in England as a legislative function of great importance and delicacy, and that it is exercised by Parliament itself, under proper precautions to secure justice.*

RATE-MAKING IN FRANCE.

The following statement, made by M. Emile Heurteau, President of the Orleans Railway, and who was one of the delegates to the International Railway Congress in Washington, is very interesting in showing the effects of State-made rates in France:—

"The maximum charges which the railways of France may make for carrying merchandise, are fixed by a contract made by each company with the Government, this contract being in effect the company's charter. The Government designates the exact course along which roads shall be built, in some cases laying it through territory

* The reader who desires to familiarize himself with rate regulation in England, is referred to "Elements of Railway Economics, Oxford. By the Clarendon Press, 1905," by William Acworth, the well-known writer and authority on railway economics. The chapter headed: "Classification and Rates: Interference of Parliament," gives a brief history of legislation in England from 1881 to 1894, which is very interesting and instructive.

which would not be profitable for private management to operate in without some sort of subvention.

"This subvention the State gives in the form of an advance or loan, on which the company must pay 4 per cent. interest and which must be returned within a specified period. During that period the company may not declare dividends above a fixed figure, the surplus that might otherwise go to dividends being used in reducing the loan.

"At the end of the specified term, usually ninety-nine years, the railroad becomes the property of the State outright, except for its rolling stock, on which the Government holds a lien, to guarantee the payment of any of the advance remaining unpaid at that time.

"This makes possible, you see, the building of railroads in places where the Government restrictions would otherwise make it impossible. Naturally, it is the taxpayer—the merchant and shipper who think they are getting so much benefit from the State's interference in the railroad business—who pays for all these things.

"It is the taxpayer—the merchant and the shipper—who pays for the construction and maintenance of canals and canalized rivers—the latter natural water courses artificially deepened or straightened—which in some places make the existence of a profitable railroad almost impossible, and in others centralize industry and traffic to the detriment of sections of the country that do not have similar advantages.

"There is no provision at all for the State's regulating charges for water transportation. The waterways are, in the eye of the law, public highways. The vessel owner may charge as much as he pleases for the services he gives, and, inasmuch as it costs him much less to render than like service costs the railway, he can depress his rates and raise them with impunity, so as seriously to affect the trend and movement of traffic.

"This is not, however, competition in the true sense. It produces such results as these:

"In the region north of Paris, which is the great industrial section of France, a very large proportion of the traffic is carried by canals, which you abandoned long ago in this country as out of date, which are slow and

subject to all manner of hindrances, from the necessity of repair, the jam of ice in winter, and what not. In southern France a very large share of the freight between Marseilles and Paris, for example,, moving in either direction, goes around the coast line instead of directly by rail.

"You can easily see the effect of this. The people are practically deprived of the more efficient means of transportation in the interests of the less efficient. This would, of course, mean much more in the United States than it does in France,—even for your great Middle West, especially.

"What, you ask, is the cause of this? It is that the Government will not allow the making of railroad rates that will take the traffic off the canals, and its refusal to allow this is due to political pressure sometimes, to the jealousy of one community toward another, to the powerful influence of the vessel owners to whom the present arrangement is of such vast financial benefit, to the difficulty of ever getting a governmental machine to reverse its action or to modify its mechanical methods.

"The inelasticity that government ownership or close government supervision invariably brings, makes it impossible that French railroad rates should go below the point at which the boats on the waterways do business.

"Not only does the Government never give its consent to the raising of rates, as might be expected, but also, extraordinary as it may seem to Americans who have had no experience with governmental control of such things, it frequently withholds its consent from lowering them. Our only protection is that our contracts with the Government have fixed maximum charges so long as the present agreements are in force.

"We would be only too glad to adopt the American system of fixing the lowest rates proper, and making up the loss of profit on each shipment out of the increased volume of business they make the railways available to, which is the only economically and commercially right and sensible way of doing. We would be glad to build up our territory as the American railways do, by encouraging its industries, by opening its markets, by enabling it to compete with other territory contributing to the same markets.

"But we cannot do that,—the State controlled rates prevent it, however strong our desire or the people's may be.

"The basis on which freight rates are made in France is generally that of distance. In fact, it is impossible that any Government or Government commission should make rates on any other basis.

"This tape-measure basis is the easiest to defend against charges of discrimination, in spite of its real injustice and its absolutely unsound economy, which a moment's thought will show. It avoids trouble and affords excuses, and your Government official's chief thought is to avoid trouble for himself; for he is first, last and all the time a politician.

"Railroads under Government supervision must set their rates close to the maxima then, and maintain them there, for their own salvation. There are many times when if it were possible we would like to lower freight charges to meet some special emergency, such as the necessities of a district suffering from a crop failure, for example.

"That is not philanthropy, but commercial sense, to help the man who creates business for you, when he is hard pressed, and to increase the volume of traffic that is falling because people have not the money to pay the price they have been accustomed to pay easily. But if we should once lower our rates,—possibly to the point of loss, as American railways have done frequently in crises—we would not be allowed to restore them later, when they should fairly be restored.

"Occasionally, temporary rates are made for the term of a year, say, but it's quite exceptional. And why, do you suppose?

"The process of reducing rates under our system of Government regulation, which is as liberal as any European system of the kind, involves so many hearings, discussions and disputes by rival boards of trade and chambers of commerce, deputies, politicians, shippers and the rest of them, that it takes many months and sometimes years to get permission to make a reduction in charges.

"By that time the necessity for which the reduction was asked is passed; it will do neither the railroad nor the

community any good; and so we do not ask for such things.

"It may seem curious to Americans, but no reduction of rates has ever been made in France to meet the needs of the railroads, however much they might want it. A striking instance of how Government regulation works in this particular is the experience of my own road in common with others a few years ago, when the phylloxera attacked the vineyards of southern France.

"There was no wine-making to speak of in France then, and the country's supply was imported from Spain. Over there wine is a staple, a necessity of the poor man as well as the rich, and we made a low rate for bringing it from Spain into Paris.

"The deputies of the vineyard districts protested, however, because they said we were carrying Spanish wine as cheaply as we were carrying French wine. The railroads were obliged to restore the high rate, and immediately the wine went to Paris from Spain by water, through the canals and canalized rivers.

"In order to make this water transportation easier, the Government made large extra appropriations for the canalization of the Seine at that time. The citizen whose temporarily non-existent industry was being 'protected,' partly for the benefit of foreign ship owners, it would appear, was a taxpayer, contributing his francs for this canal construction and repair when he could least afford it.

"As I have told you, our charges for transporting freight are fixed in the railway's original contract with the Government, and set down in the *cahier des charges*—what you would call tariff sheet or rate book, I suppose. For obvious reasons, the railways never have consented to give the State the right to lower these maximum charges, nor can it be expected that they ever will consent to such a thing.

"Our contract with the Government is like any other contract; it cannot be altered except with the consent of both parties. Any form of government supervision short of absolute government ownership must be based on contracts of that kind, otherwise what protection would there be for the vested interests?

SUMMARY.

"Petitions for lower rates are made to the Director of Railways from time to time, and perhaps he will suggest the desirability of considering some of them, but he has no power to enforce such demands. Of course, sometimes we must yield to such petitions against our better judgment, when they are evidently nothing less than sectional selfishness. The pressure which any Government can bring to bear is tremendous, and may not be withstood in certain circumstances, even though it may threaten industrial misfortune.

"The wonderful growth and development of the United States is the admiration of the whole world. I have no doubt it is to be attributed largely to the freedom you have always enjoyed in your commercial and industrial life.

"Opportunity is given here for railways and communities to be mutually helpful, and splendid use has been made and is being made of it. The few cases of complaints against your railways, the expansion of trade through the opening of European markets to the producers of your Central and Western States, who are enabled to deliver their products abroad, the low cost of transportation that enables them to compete there with the foreign producer near at hand, whose railways are in no position to help him—all these things seem to me sufficient evidence of the success and desirability of the American practice in the management and regulation of railway matters.

"Any economist, any business man, any transportation manager will tell you that the present American method of fixing freight rates is the only logical and rational one."*

SUMMARY.

I.

Rate regulation is absolutely necessary for the protection of the public, as well as of the owners of railroads. The public must be protected against unjust discriminations; and the owners of railroads should be pro-

* (From the *New York Sun* of May 21, 1905.)

tected against rate-wars, which destroy the fruits of their investments and enterprise. Both evils have a common cause: the remedy that effectively cures one must necessarily cure the other.

II.

The cause of the evils is unrestrained competition, which must inevitably produce unjust discrimination.

III.

While the efforts of the railroads to regulate rates by means of traffic associations have in a great measure mitigated the evils resulting from unrestrained competition, they have not proved successful. Rate-cutting and rebating prevailed to a considerable extent, especially in the North and Northwest, during the period from 1875 to 1887, when the division of traffic called pooling was permitted. This failure was due to the fact that agreements were not enforceable, and that, up to 1887, the Government had not enacted any laws prohibiting unjust discriminations.

IV.

The Act to Regulate Commerce, supplemented by the Elkins Act, has proved of value, and, notwithstanding its defects, it has conferred great benefits upon the public and the railroads. The results of the operation of this Act would have been more beneficial if all of its provisions had been properly enforced. This was found to be impracticable, because the enormous amount of work, and the varieties of the functions imposed upon the Commission by the Act, are not within the scope of the physical and mental powers of the Commissioners, however great may be their ability and industry.

V.

The most serious defect of the Act to Regulate Commerce, and of the Antitrust Act, is the underlying idea that competition must be left unrestrained. This idea is inconsistent with the object of the legislation, and tends to defeat its purpose, because unrestrained competition produces the very evils which the Act to Regulate Commerce was enacted to cure.

VI.

Rate regulation by the railroads alone, without the aid of wise legislation, can never be effectual. Efforts at regulation by the Federal Government alone cannot fully attain its object. It is only by co-operation—by the combined efforts of the Government and the railroads, that the evils resulting from unrestrained competition can be permanently corrected.

VII.

The Sherman Antitrust Act, in destroying efficient traffic associations, has deprived the railroads of the best means of co-operating with the Government in the regulation of rates.

VIII.

The application of the Antitrust Act to the railroads was a retrograde step in the evolution of railroad regulation. It tends to defeat the main purpose of the Act to Regulate Commerce; and it also defeats its own object: instead of curbing the bad commercial trusts, it indirectly strengthens them, by giving them greater power to exact concessions in rates from railroads, thus assisting the trusts to crush their rivals.

IX.

Owing to the regulating influence of competition by water routes, and the operation of economic and commercial laws, railroad corporations in this country can never become monopolistic trusts. Rates by water routes should not be subjected to regulation by the Government except when such routes form parts of through lines in connection with railroads.

X.

Railroad consolidations have greatly simplified the railroad problem, and have been of assistance in rate regulation to the extent to which they have restrained reckless competition.

The division of traffic, miscalled pooling, is no longer essential to the regulation of rates by the railroads themselves, consolidations having absorbed so many of the weaker roads that were compelled to be disturbers of the peace.

XI.

Congress, in enacting the Act to Regulate Commerce, did not intend to confer the rate-making power upon the Interstate Commerce Commission. Hence, it is not true, as has been claimed, that the U. S. Supreme Court, in deciding the Maximum Rate cases, took that power away from the Commission. The impression that the Commission exercised the rate-making power for many years without protest or opposition by the railroads is erroneous.

XII.

The efforts of the Commission to obtain the rate-making power, supported by certain commercial and industrial organizations, resulted in the introduction into

Congress of several bills, notably the Cullom, Nelson-Corliss, and Quarles-Cooper Bills, providing for the enlargement of the powers of the Commission. These bills failed of passage. No great interest was taken in the subject by the general public, until President Roosevelt, in his Message to Congress of December, 1904, called attention to the unjust discrimination, and especially to the iniquitous practice of paying rebates, and recommended that the Interstate Commerce Commission be clothed with the power of revision of rates, the revised rates to take effect practically at once; stating, however, that, in his opinion, "*at present it would be undesirable, if it were not impracticable, finally to clothe the Commission with general authority to fix railroad rates.*"

XIII.

Owing to the powerful influence of the President, the House of Representatives, on February 9, 1905, passed almost unanimously (by a vote of 326 to 17), the Esch-Townsend Bill.

XIV.

The passage of this Bill marks a radical departure from the wise and conservative policy inaugurated by Congress in 1887, which policy had been continued up to 1905, in legislating on the regulation of railway rates. The Townsend Bill confers the general rate-making power upon the Commission, under guise of giving it the power of revision.

XV.

Owing to the interdependence of rates, the power of revision of rates, the revised rates taking effect practically at once, is equivalent to a general rate-making power.

XVI.

Rate-making by the Government is wholly impracticable. It would be impossible for a bureau in Washington to fix rates for all the railroads in this country,—a work that requires the continuous attention of hundreds of trained traffic officials. Judge Cooley, Chairman of the Interstate Commerce Commission, in its First Annual Report, declared that such a work in a country as large as ours, with so vast a mileage, would be superhuman.

XVII.

The exercise of the rate-making power by the Government is not necessary, even if it were practicable, because the Act to Regulate Commerce, supplemented by the Elkins Act, provides for the correction of every evil that can be remedied by legislation, and confers ample powers upon the Commission and upon the courts to enforce the law. The number of formal complaints against the railroads have greatly diminished, and existing laws, *if properly enforced,* are adequate for the protection of the public.

XVIII.

Rate-making by the Government, instead of correcting existing evils, would aggravate them, and would create new evils far more serious. The following are some of its injurious effects:—

(a)

Government rate-making has a tendency to obstruct commerce, because it destroys the present flexibility of railroad tariffs, and makes the shipper dependent upon a Government bureau which would be unable to promptly and intelligently adjust rates to varying commercial conditions.

(b)

It has a tendency to encourage rebating, because of the inability of the bureau to act promptly. Railroad officials would be importuned by shippers for relief; and it is probable that they would yield to the constant pressure, and pay rebates pending the action of the rate-making bureau.

(c)

It would congest the courts with innumerable interstate commerce cases, and cause more serious delays than those at present complained of by shippers. The attempt to perform the work of rate-making for the entire country by a bureau that cannot have the requisite knowledge of local conditions, would cause many errors and complications; and applications for relief would be so numerous as to congest the courts with interstate commerce cases.

(d)

It would produce unjust discrimination against localities, and subject commerce to the control of an autocratic Government bureau. The attempts of a rate-making bureau to readjust the relation of rates between localities, that have been established during many years of commercial rivalry, and of competition between railroads, would necessarily result in confusion which must cause unjust discrimination against localities. The power to readjust these relations would manifestly give such a bureau absolute control over the commerce of the country that is dependent upon railway transportation. By fixing the relations of rates, it could apportion the traffic among business communities, determining the character and quantity of business each community should be allowed to transact, and designate the markets to which it should send its commodities.

(e)

Rate-making by the Government would necessitate making the rates by water routes subject to the jurisdiction of the rate-making powers; thus impairing if not destroying their usefulness as regulators of railway rates.

XIX.

As the value of railroads to their owners consists in their earning capacity, it is manifest that to take the vital function of rate-making out of the hands of these owners, would practically place the control of the properties in the hands of the rate-making bureau, which could determine the amount of income these owners should derive from their investments. It would be taking their property without *any* compensation; and, according to the rate-making scheme, this would be done by a *peculiar process of law;* that is, by a perversion of existing legal procedures that would deprive railroads of the protection of the courts. For the bills for enlarging the powers of the Commission that have been introduced, afford no redress to the railroads in cases of an appeal to the courts from any orders of the Commission, because the reduced rates take effect at once of their own force;—so that, pending the decision of the courts, the railroads have to suffer heavy losses. Under this procedure, a corporation is presumed to be guilty until it proves itself to be innocent; and punishment is inflicted upon it before it has had its day in court. This punishment would in most cases be very severe. For example: in the Maximum Rate cases, the twenty-one defendant railroads would have lost at the rate of $3,000,000 per year if they had obeyed the orders of the Commission.

But the injustice does not end here. Eminent lawyers are of opinion that the rate-making function having been

declared a legislative power, the courts will decline to review the action of the Commission to which the Congress has delegated this function, unless the rates made by it are confiscatory. Counsel have also expressed the opinion that if a locality should be aggrieved by the action of the Commission, it would probably not have any redress whatsoever.

XX.

It appears from the Statistics of Railways in the United States for 1903 (pages 56 and 57), as issued by the Interstate Commerce Commission, that on June 30, 1903, there were outstanding in railroad stocks $6,155,559,032
and that the total funded debt was..... 6,444,431,226

A total of..... $12,599,990,258

This enormous amount, representing railroad property, would be under the control of the rate-making bureau; and the people who have invested their money in railroad securities would have to look to that bureau for their income.

XXI.

Rate-making by the Government would injuriously affect the value of railroad securities, impair the credit of railroad companies, and the efficiency of their services to the public.

XXII.

Rate-making by the Government would reduce the earnings of the railroads to an extent that would render it necessary to cut down the wages of their employees. This would produce strikes and a demoralization of the railroad system, and of the commerce of the country.

SUGGESTIONS AS TO WHAT LEGISLATION IS NECESSARY AND PRACTICABLE.

A careful consideration of all the facts and circumstances developed in the course of this inquiry, will doubtless enable the thoughtful reader to draw his own conclusions. The following suggestions, however, may perhaps aid him in solving the question:—What legislation is really necessary and practicable?

I.

The most important legislation that is needed, is an amendment of the Antitrust Act that will restore to the railroads the right to organize efficient traffic associations for the purpose of establishing and strictly maintaining reasonable rates, and to co-operate with the Interstate Commerce Commission in the enforcement of the laws which prohibit unjust discrimination.

An amendment of the fifth, or antipooling section of the Act to Regulate Commerce, so as to permit so-called pooling, is no longer necessary, if it were practicable.

II.

If the railroads are unable to deal with the private car lines, Congress should bring these lines under the jurisdiction of the Act to Regulate Commerce and the Elkins Act; and it should also strengthen the present laws by amendments specifically covering all devices for paying rebates, including the allowances made to private sidings, switches, etc.

III.

To bring water routes under the jurisdiction of the Commission, as suggested in the President's message, would be a serious legislative mistake. These routes

should be left untrammeled by any Government regulation.

IV.

Good results would follow a reorganization of the Interstate Commerce Commission. The number of members should be increased from five to seven, as provided in the Townsend Bill. But the appointments should be made with a view to the qualifications that are essential in the discharge of their duties, rather than from political considerations. For example—three of the members might be railroad men, three lawyers, and one a business man. Four members, say, two lawyers and two railroad men, should be appointed for life, or during good behavior—the remainder for six years, as under the present law.

V.

The Commission should be relieved of the duty of acting as detectives and prosecuting attorneys, and also of the work connected with the safety appliances acts: and its work should be confined to the investigation and decision of cases that come before it.

VI.

As legislation in this country is responsive to public sentiment, the most important element of success in the effort to regulate rates, is a better understanding by the public of the railroad problem. I would suggest, therefore, that Congress order the reprinting and distribution of a new edition of the Report of the Senate Select Committee of January 18, 1886, together with the forthcoming Report of the Senate Committee on Interstate Commerce, of the Fifty-eighth Congress.

CONCLUSION.

When, in 1851, I entered the railway service, there were about 9,000 miles of railroads in this country; and their earnings from passengers and freight in that year were not quite forty millions of dollars.

According to the Report of the Interstate Commerce Commission, the railroad mileage on June 30, 1903, was 207,977 miles; and the revenues, $1,900,846,907.

The immense improvements that have been made in railway facilities can hardly be appreciated by the younger generation: for there are few travelers who, in these days, ride at the rate of sixty or even seventy miles an hour in splendidly equipped passenger trains, over smooth, well-ballasted, steel-rail tracks, who can recall the time when primitive trains jolted at the rate of fifteen to twenty miles per hour over rough tracks made of iron strap-rails spiked to longitudinal stringers that rested on mudsills,—a rail that was known as the "snakehead," from its tendency to turn up and penetrate the floors of the passenger cars.

The rail in the form of an inverted "U," secured at the ends by cast-iron "chairs," was a great improvement on the "snakeheads." The passenger equipment was as uncomfortable as it could be made. Sleeping, dining and parlor cars were not even thought of; nor were sleeping cars necessary, because it was generally thought to be unsafe to run passenger trains at night.

Imperfect as these facilities were, they were perfectly satisfactory to the people, who were inclined to apply to the builders of railroads, what the enthusiastic Irishman had said about the builders of macadamized turnpikes:

"Oh, had you seen these roads before they were made,
You would lift up your hands and bless Marshall Wade."

In the course of years there came a change in public sentiment. The benefits conferred by the railroads were largely forgotten, and the dark side—the evils attending railroad transportation—became prominent. That the railroad managers made numerous mistakes, cannot be denied. It would be marvelous if it had been otherwise, for they were working in a new field, with no precedents to guide them. Almost every act had to be tentative. But repeated failures showed the way to improvement, and ultimately to success. One of the worst features, however, and which, more than any other, caused hostility against the railroads, was that in some parts of the country, the spirit of enterprise which had made railroads possible, degenerated into dishonest speculation. The public feeling grew from bad to worse; and the time came in the early '70's, when, under the influences of hard times and popular excitement, railroad builders who in the earlier years had been regarded as public benefactors, were denounced as oppressors, enemies of the people, and grasping monopolists who must be restrained by the most stringent legislation. This feeling found expression in the famous Granger laws, known in Wisconsin as the Potter laws.

But with better times, a reaction ensued, and a better feeling prevailed. Some of the objectionable laws were repealed or amended. The railway commissioners of Wisconsin, in their report for 1874, in setting forth the inconsistency of these laws, conclude as follows:—

"Surely there is no apology for the exercise, on the part of the State, of any power over corporations which can be safely and as wisely exercised by the corporations themselves. There is no principle of American government so thoroughly or so properly established as that which limits the province of legislation, at all times and under all circumstances, to enactments for the general good, and which denies to Government the right or the

duty of unnecessary interference with private or public enterprise."

These are wise words. They are as true to-day as they were when written. They apply to legislation by the Federal Government as well as to State legislation.

Upon the whole, the relations between the railroads and the people have undergone a great improvement. Railroad managers, recognizing their obligations to the public, have assumed a better attitude toward it; and the public entertains somewhat sounder views on railroad questions. It is surprising, however, that notwithstanding the frequent discussions in legislatures and in Congress, and the efforts of the public press to enlighten the people, the railroad problem is not as well understood by the public as its importance demands. This is probably due to the fact that the American people are too busy *"doing things"* to investigate questions other than those which enter into politics.

I concur in the opinion expressed by President Spencer of the Southern Railway, in concluding his Address before the Traffic Club of Pittsburgh in April, 1905,—that the verdict of "the court of last resort, that great tribunal, public opinion," upon the complex and far-reaching question now being agitated, will be just and fair when the question shall be thoroughly understood in all its bearings.

This inquiry was not originally intended for publication. The advice of friends, and my own earnest desire to contribute, be it ever so little, to a better understanding of the important question, have induced me to submit it to the consideration of readers who are interested in the subject of railway regulation.

HENRY FINK.

NEW YORK, August 1, 1905.